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In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Respondents seek personal damages from petitioners, who are former high officials of the Department of Justice, claiming that petitioners failed to terminate federal funding by the Law Enforcement Assistance Administration to state and local government agencies that practiced discrimination on the basis of race and sex. The questions presented are:

1. Whether respondents have stated a claim for damages under the Fifth Amendment, when they have not alleged that petitioners acted with discriminatory intent and when they acknowledge that petitioners took actions (other than terminating funds) in response to the recipient agencies' alleged discrimination.

2. Whether, even assuming respondents have stated a claim under the Fifth Amendment, petitioners are entitled to qualified immunity as a matter of law because they did not violate any clearly established constitutional rights.

3. Whether petitioners are entitled to absolute immunity because, in deciding whether to initiate funding termination proceedings, they performed functions analogous to those of a prosecutor.

4. Whether respondents may seek damages from petitioners under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq.*

5. Whether respondents have standing to maintain this action.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the petitioners are Edward H. Levi, Herbert C. Rice, and Charles R. Work; the respondents are Penelope Brace, Bruce Bailey, Kristen Heemstra, Ollie S. Glover, Joel Michelle Schumacher, Raymond Clark, Kent G. McKinney, Penny Orazetti, Roberta Ledyard, Robert Booth, William Harris, and Jennie McAllister. The Law Enforcement Assistance Administration and the United States Department of Justice were named as defendants and were appellees in the court of appeals but are not petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Richard W. Velde, Edward H. Levi, Charles R. Work, and Herbert C. Rice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App., *infra*, 1a-28a) is reported at 712 F.2d 569. This Court's order remanding the case to the court of appeals (App., *infra*, 34a) is reported at 458 U.S. 591. The prior opinion of the court of appeals (App., *infra*, 35a-55a) is reported at 631 F.2d 784. The district court's order (App., *infra*, 56a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1983 (App., *infra*, 29a-30a). A petition for rehearing was denied on September 1, 1983 (App., *infra*, 31a). On November 23, 1983, the Chief Justice extend-

ed the time in which to file a petition for a writ of certiorari to January 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 509 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 206, as reenacted by Section 2 of Pub. L. No. 93-83, 87 Stat. 211, codified at 42 U.S.C. (1970 ed., Supp. V) 3757, provided:

> Whenever the [Law Enforcement Assistance] Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

3. Section 518(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as added by Section 2 of Pub. L. No. 93-83, 87 Stat. 214, codified at 42 U.S.C. (1970 ed., Supp. V) 3766(c), provided:

> (1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter.

(2) Whenever the Administration determines that a State government or any unit of general local government has failed to comply with paragraph (1) of this subsection or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 3757 of this title, and is authorized concurrently with such exercise—

(A) to institute an appropriate civil action;

(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or

(C) to take such other action as may be provided by law.

(3) Whenever the Attorney General has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

STATEMENT

1. The Law Enforcement Assistance Administration (LEAA) was an agency within the Department of Justice authorized to give technical and financial assistance to state and local governments for the purpose of aiding law enforcement. See 42 U.S.C. 3701 *et seq.*[1] While the

[1] The Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, codified at 42 U.S.C. (Supp. V) 3701 *et seq.*, restructured the LEAA. Congress last appropriated sig-

LEAA distributed substantial funds overall, its grants generally constituted only a small percentage of the budgets of recipient law enforcement agencies.[2] At all times relevant to this suit, Section 518(c)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 provided that "[n]o person * * * shall on the ground of race, color, national origin, or sex * * * be subjected to discrimination under any program or activity funded in whole or in part with funds" from the LEAA. 42 U.S.C. (1970 ed., Supp. V) 3766(c)(1).

The Crime Control Act authorized the LEAA to enforce this prohibition by invoking an enforcement scheme consisting of several stages. First, under Section 518(c)(2) of the Act, if "the Administration determine[d]" that a recipient was discriminating, it was to "notify the chief executive of the [relevant] State of the noncompliance" and "request the chief executive to secure compliance." The LEAA was then to allow the chief executive "a reasonable time" to secure compliance. If the chief executive failed to do so, the LEAA could take a number of steps: it could "institute an appropriate civil action"; it could act under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; or it could "take such other action as may be provided by law." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).

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nificant funds for the LEAA in 1980, and in 1982 the Attorney General transferred its remaining programs and staff to the Office of Justice Assistance, Research, and Statistics (see 47 Fed. Reg. 16694-16695 (1982)). These developments do not affect the issues before the Court.

[2] For example, in 1974, the Philadelphia Police Department—one of the recipient agencies whose practices are complained of in this case—received a total of less than $800,000 in LEAA grants. The Department's total budget that year was almost $132 million. Thus, LEAA grants accounted for approximately 0.6% of the 1974 Philadelphia Police Department budget.

Section 518(c)(2) also provided that if the chief executive failed to secure compliance "within a reasonable time," "the Administration shall exercise the powers and functions provided in" Section 509 of the Act, 42 U.S.C. (1970 ed., Supp. V) 3757. Section 509, in turn, was a general funding termination provision applicable to cases in which a recipient violated any provision of the Act or any LEAA regulation. It provided that if, after notice and an opportunity for a hearing, "the Administration * * * finds that * * * there is a substantial failure to comply," it shall terminate payments to the recipient "until there is no longer such failure."[3]

2. In 1975, respondents—six blacks, six women, and an organization that represents black police officers—filed this suit in the United States District Court for the District of Columbia. They named as defendants the petitioners, who were then officials in the Department of Justice—Attorney General Edward H. Levi, LEAA Administrator Richard W. Velde, LEAA Deputy Administrator Charles R. Work, and Director of LEAA Office of Civil Rights Compliance Herbert C. Rice. Petitioners were sued in both their personal and their official capacities. The Department of Justice and the LEAA were also named as defendants. Respondents sought declaratory and injunctive relief and, relying on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), $20 million in personal damages from petitioners. Complaint, paras. 1-19, 112; J.A. 13-17, 43-44.[4]

Repondents claimed that they were discriminated against, on the basis of race and sex, by certain state

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[3] The LEAA had the option of terminating payments only to the activities that were not in compliance. 42 U.S.C. (1970 ed., Supp. V) 3757.

[4] "J.A." refers to the Joint Appendix filed when this case was previously before this Court (458 U.S. 591 (1982) (No. 80-1074)).

and local police departments that had received and were receiving LEAA grants.[5] They asserted that petitioners' failure to terminate funds to these discriminating agencies "served to finance and thus to perpetuate the discriminatory and exclusionary employment practices of LEAA recipients" (Complaint, para. 41(b); J.A. 26). In this way, respondents asserted, petitioners discriminated against them and violated their constitutional and statutory rights.

Respondents did not allege that petitioners acted with discriminatory intent at any time. Nor did respondents claim that petitioners failed to act in response to the alleged discrimination by the state and local agencies; on the contrary, the complaint itself detailed a number of enforcement actions taken by petitioners. For example, the complaint stated that petitioners had conducted numerous "onsite compliance reviews" of state and local law enforcement agencies and had adopted a policy of conducting "pre-award compliance reviews" of large recipients to determine if they were discriminating (Complaint, paras. 28, 29; J.A. 20). The

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[5] For example, respondent Brace alleged that she was discriminatorily harassed by the Philadelphia Police Department (Complaint, paras. 43-46; J.A. 26-28). (We note that petitioners at one point caused the Department of Justice to bring suit against the Philadelphia Police Department to prevent respondent Brace's dismissal (see page 7 note 6, *infra*).) Respondent Bailey, who is black, claimed that the Indiana State Police Department, among other things, "limited the breadth of experience of the few black troopers through discriminatory assignments, thereby limiting the promotion opportunities of the black troopers" (Complaint, para. 53; J.A. 29). Respondent Heemstra, a woman, claimed that three local police forces in Iowa discriminated against her by maintaining minimum height and weight requirements (Complaint, paras. 58-65; J.A. 30-32). The Richmond, California, Oakland, California, New Orleans, and Honolulu Police Departments were among the other local law enforcement agencies named in the complaint as recipients that discriminated (paras. 66-83, 99-102; J.A. 32-36, 40-41).

complaint further stated that petitioners "attempted to secure voluntary civil rights compliance from the Portland [Oregon] Police Bureau," one of the local agencies that allegedly discriminated against respondents, "during the the past several years" (Complaint, para. 91; J.A. 38), and that petitioners had investigated complaints of discrimination made by respondents against several of the allegedly discriminatory recipients (Complaint, paras. 76, 82, 84, 102; J.A. 34-36, 38, 41).[6]

The complaint also stated that petitioners had engaged in "several months of investigation and unsuccessful efforts to achieve voluntary civil rights compliance from the Philadelphia Police Department," another of the local agencies that allegedly discriminated against respondents; that petitioners had sent a written warning to that Department, stating that it was not in compliance; and that the Department of Justice was considering litigation against the Philadelphia Police Department (Complaint, paras. 47-50; J.A. 27-28). Indeed, to support the allegation that some recipient law enforcement agencies were engaged in discrimination, the complaint relied on the fact that the Department of Justice had filed employment discrimination actions against them (Complaint, para. 25; J.A. 19).

In sum, respondents acknowledged that petitioners took many steps to enforce the civil rights obligations of recipient agencies. The centerpiece of their complaint was that petitioners violated the Constitution simply by not invoking one particular measure, the termination of funding.

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[6] The record shows that when one of the respondents, Penelope Brace (see Complaint, paras. 42-50; J.A. 26-28), complained to petitioners that she was about to be dismissed from the Philadelphia Police Department for discriminatory reasons, the Department of Justice sued to prevent her dismissal (C.A. App. 692).

3. In December 1976, the district court dismissed the complaint, holding that respondents' "claims for monetary damages against [petitioners] in their individual capacities are barred by the doctrine of official immunity" (App., *infra*, 57a).[7] A divided court of appeals reversed (*id.* at 35a-55a). The court ruled that petitioners' qualified immunity defense raised issues of fact that had to be resolved by a trial (*id.* at 40a). Judge Bazelon's opinion for the panel majority then acknowledged that under *Butz* v. *Economou*, 438 U.S. 478, 515-516 (1978), administrative officials performing functions similar to those of a prosecutor are entitled to absolute immunity (*id.* at 38a-39a), but rejected petitioners' contention that they were entitled to absolute immunity under this principle, reasoning (*id.* at 39a):

> The purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency officials lack discretion. [Petitioners] have virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients.

In a footnote, the majority rejected petitioners' contention that respondents lacked standing, stating simply that respondents "have alleged violations of their right to be free from federal funding of state and local agencies that have discriminated against them" and that this "interest is precisely that which is protected by the Constitution and the statutes" invoked by respondents (App., *infra*, 40a n.16).

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[7] The district court dismissed respondents' claims for declaratory and injunctive relief as moot (App., *infra*, 56a), but the court of appeals reversed (*id.* at 36a-37a). On remand, the court of appeals noted that the termination of the LEAA (see page 4 note 1, *supra*) might raise new mootness questions, but it directed the district court to resolve those questions in the first instance (App., *infra*, 2a n.3). These issues are not now before this Court.

Judge Tamm dissented on the ground that petitioners were entitled to absolute immunity (App., *infra*, 48a-55a). He noted that petitioners were being sued for having made such decisions as "whether to move forward with a proceeding to terminate funding, or, for example, to seek voluntary compliance * * * (perhaps under the threat of termination)" (*id.* at 50a). These, Judge Tamm urged, were "exactly what the Supreme Court had in mind when it spoke of functions 'analogous to those of a prosecutor'" (*ibid.*, quoting *Butz*, 438 U.S. at 515).

Judge Tamm also rejected the majority's assertion that the enforcement provisions of the Crime Control Act left petitioners with little or no discretion; he pointed out that petitioners had to exercise discretion at virtually every step of the enforcement scheme (App., *infra*, 50a-53a).[8]

4. This Court granted certiorari (451 U.S. 969 (1981)). After the case was briefed and the Court heard oral argument, however, it vacated the decision of the court of appeals and remanded for further consideration in light of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). App., *infra*, 34a.

On remand, the court of appeals reinstated its judgment reversing the dismissal of the complaint (App., *infra*, 1a-28a). The opinion of Judge Bazelon, who again wrote for the majority, readopted the court's prior

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[8] Judge Tamm also disagreed with the majority's analysis of the standing issue. He noted that the only plausible basis on which respondents could claim standing was that the termination of LEAA funds would have caused the recipient agencies to cease discriminating against them (App., *infra*, 44a-46a & n.7). Judge Tamm expressed doubt that respondents could make this showing but indicated that he would be willing to allow the issue to be resolved on a motion for summary judgment, after some evidence had been introduced, instead of on a motion to dismiss (*id.* at 46a-48a, citing *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)).

holdings on absolute immunity and standing (*id.* at 2a n.3, 27a n.26). The majority ruled that petitioners were not entitled to qualified immunity under *Harlow* because "clear duties to terminate funding existed under both the Crime Control Act and the fifth amendment" (*id.* at 2a).

Specifically, the majority stated that "it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating" (App., *infra*, 20a).[9] The majority recognized that respondents had never claimed that petitioners acted with a discriminatory intent (*id.* at 21a-23a). But the majority stated that even if the government acts without discriminatory intent, it may not "support[] indirectly" discriminatory activities "through the provision of support for other persons engaged in such activity" (*id.* at 20a). The court said that the question in this case was whether the LEAA engaged in "a form of involvement" that "requires us to impute the actions and motives of the local agencies to the federal government" (*id.* at 24a), and it asserted (*ibid.*; footnote omitted): "[T]he constitutional prohibition on intentional discrimination clearly prohibits the government from funding other agencies engaged in such practices."

The court accordingly ordered further evidentiary proceedings to determine whether petitioners "knew or should have known" that recipients of LEAA funds were engaged in discrimination (App., *infra*, 25a (em-

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[9] In concluding that the Crime Control Act established a clear duty that was allegedly violated by petitioners, the court relied again on what it considered to be the "mandatory language" of the enforcement provisions (App., *infra*, 13a). The court acknowledged that "some limited discretion under the statute does exist" but asserted that "[t]hese limited areas of discretion do not * * * render [petitioners'] statutory obligation so unclear as to entitle them to qualified immunity" (*id.* at 17a).

phasis and footnote omitted)). Judge Tamm adhered to his earlier opinion dissenting on the basis of absolute immunity (*id.* at 28a). Petitioners' suggestion of rehearing en banc was denied by a vote of three to two, with five judges not participating (*id.* at 32a-33a).

REASONS FOR GRANTING THE PETITION

Respondents seek $20 million in damages from former high officials of the Department of Justice, including a former Attorney General, who have never been alleged to have acted with an improper intent, or to have authorized, controlled, supervised, or encouraged discrimination. This suit, now nine years old, has once more been kept alive by the court of appeals, this time on the basis of the insupportable conclusion that the Constitution clearly prohibited the actions in which petitioners allegedly engaged.

The court of appeals' action could not be more inconsistent with this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and with the Court's repeated admonitions that insubstantial *Bivens* actions against government officials are to be promptly ended. No reasonable interpretation of this Court's decisions supports the holding of the court of appeals that petitioners violated a clearly established constitutional prohibition. By retrospectively inventing a clearly established right in this fashion, and remanding for further proceedings at which the plaintiffs will be able to explore the defendant officials' state of mind, the court of appeals has defeated the central purposes of *Harlow*. In *Harlow*, the Court created a new regime for the consideration of the defense of qualified immunity; review is warranted here to assure that that regime is not emptied of meaning in its very incipiency.

In addition, the potential effects of the court of appeals' decision on the operations of the government can scarcely be overstated. Numerous important federal programs involve the distribution of funds to agencies of state and local governments. These programs would

be substantially affected if, as the court of appeals appears to have held, the Constitution is violated whenever any funds reach any recipient agency that is known to have discriminated—even if the discrimination consists of a minor incident, the funding program serves important social objectives, and the responsible officials are taking other steps to remedy the discrimination. Indeed, under the court of appeals' approach, officials throughout the government who act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability. In order to "avoid [this] excessive disruption of government" (*Harlow*, 457 U.S. at 818) and unfairness to individuals, further review is warranted.

1. Respondents' complaint—which never asserted, in any of its prolix allegations, that petitioners acted with discriminatory intent—does not state a claim under the Constitution.[10] "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). "[*P*]*urposeful discrimination* is 'the condition that offends the Constitution.'" *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274 (1979), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) (emphasis added). "[T]he absence of proof of discriminatory intent forecloses any claim that * * * official action * * * violates the Equal Protection Clause" (*City of Memphis* v. *Greene*, 451

[10] The court of appeals asserted that the question whether respondents have stated a claim on which relief can be granted "has not been briefed for us" (App., *infra*, 7a n.27). This is wrong. It was explicitly discussed at pages 6-14 of the Appellees' Supplemental Memorandum filed in the court of appeals after remand.

U.S. 100, 119 (1981)). See also *Washington* v. *Davis*, 426 U.S. 189, 208-209 (1973).

Respondents' failure to allege that petitioners acted with discriminatory intent should, therefore, have been fatal to their claim. Even if petitioners are alleged to have acquiesced in discriminatory practices of the recipients, "[s]uch acquiescence is not the equivalent of a discriminatory purpose" (*Pullman-Standard* v. *Swint*, 456 U.S. 272, 292 n.23 (1982); see also *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)).[11] In fact, the complaint repeatedly alleged (paras. 25, 47-50, 76, 84, 88-91, 102; J.A. 19, 27-28, 34-38, 41) that the local agencies continued to discriminate *despite* petitioners' efforts; as this Court has recently said, "'[d]iscriminatory purpose' * * * implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (footnote omitted).[12]

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[11] Indeed, it is not even clear from the complaint whether any of the recipients are charged with intentional discrimination; in at least some instances (Complaint, paras. 26, 31, 60-63, 68, 74, 79, 83, 90, 93, 94, 100; J.A. 19, 21, 31-36, 38-40) it is clear that the allegedly discriminatory practices of the recipients violated only Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, not the Constitution (see *Washington* v. *Davis*, 426 U.S. at 239).

[12] Moreover, the court of appeals' conclusion that petitioners can be held to have violated the Constitution "regardless of [their] purpose" (App., *infra*, 23a), is wholly inconsistent with the approach recently taken by the Eighth Circuit in a similar case, *Clients' Council* v. *Pierce*, 711 F.2d 1406 (1983). *Clients' Council* was a suit alleging that officials of the Department of Housing and Urban Development violated the Constitution by not terminating federal funds to the Texarkana Housing Authority, which allegedly discriminated on the basis of race. The Eighth Circuit ruled (*id.* at 1409 (citations omitted)):

> The district court correctly stated that in order to establish a constitutional violation, the appellants must prove that HUD officials acted with a discriminatory purpose.

The court of appeals nevertheless refused to affirm the dismissal of the complaint. In doing so, the court principally relied (App., *infra*, 21a-25a) on *Norwood* v. *Harrison*, 413 U.S. 455 (1973), which invalidated a Mississippi program of lending textbooks to schools to the extent that discriminatory private schools were among the recipients. But *Norwood* cannot possibly be read as standing for a general rule that the government violates the Constitution whenever governmental aid in any form reaches parties that engage in discrimination.

As the Court in *Norwood* noted, the Mississippi textbook lending program was implemented against a background of steadfast resistance to court decrees ordering the dismantling of a segregated dual school system. See 413 U.S. at 463 & n.6 and cases cited; *id.* at 467 & n.9. See also *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568-569, 570-571 n.10 (1974).[13] Petitioners, by contrast, were carrying out a civil rights *enforcement* scheme, and—as is apparent from the complaint itself—their decisions not to terminate funding occurred in the context of other enforcement actions. A discretionary choice among civil rights enforcement techniques is not remotely comparable to a measure that promotes private "segregation academies," and no reasonable Department of Justice official would have thought it clear—or even possible—that these two actions would be treated alike by a court.

Although there is ample evidence that the Texarkana Housing Authority intentionally discriminated on the basis of race, HUD cannot be held liable unless its own conduct was tainted with a discriminatory purpose.

[13] We also stressed this point in our Memorandum for the United States as Amicus Curiae in *Norwood*. See 72-77 U.S. Am. Mem. 13-18.

Norwood, of course, was a suit for injunctive relief from the government, not for personal damages from individual officials. To obtain money damages from an individual official, something more than "imputed" intent should be required.

In addition, the Court in *Norwood* emphasized the material importance of the textbook program to the schools (see 413 U.S. at 464-465, 466). LEAA assistance was, by contrast, only a minor part of the budgets of the recipient agencies involved here. See page 4 and note 2, *supra*. Many government programs that may have the incidental effect of aiding parties engaged in discrimination do not violate the Constitution even though they are far more valuable to the recipients than LEAA aid was to the law enforcement agencies in this case. For example, government agencies do not violate the Constitution if they provide police and fire protection and utilities to parties engaged in overt discrimination (see, *e.g.*, *Norwood*, 413 U.S. at 465; *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 573-574 (1974)), or a liquor license to a private club that refuses to admit blacks (*Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972)). See also *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351-352 (1974).

The court of appeals appeared to believe that it was significant that LEAA aid took the form of a direct grant of funds.[14] But this Court has recently stated

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[14] It appears that the court of appeals' only explanation for its conclusion that the Constitution distinguishes—indeed, *clearly* distinguishes—between LEAA assistance and other clearly permissible forms of aid is that the LEAA aid took this form. See App., *infra*, 24a ("[T]he constitutional prohibition * * * clearly prohibits the government from funding other agencies engaged in [discriminatory] practices."). Not only does this view make little sense—there is no reason to treat monetary aid differently from equally valuable aid that takes a different form—but, as we explain in the text, it is clearly contrary to this Court's precedents.

In support of this supposedly clearly established proposition, the court of appeals cited only two authorities—a court of appeals decision the reasoning of which has been explicitly rejected by this Court, and ambiguous dictum in the opinion of a three-judge district court. Specifically, the court of appeals cited (App., *infra*, 24a n.72) *Gautreaux* v. *Romney*, 448 F.2d 731 (7th Cir. 1971), and *Green* v. *Connally*, 330 F. Supp. 1150

that even if "virtually all of [a party's] income [is] derived from government funding," that party's actions will not necessarily be imputed to the government for constitutional purposes. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). "Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). See also *United States* v. *Orleans*, 425 U.S. 807, 818 (1976). "That programs undertaken by the State result in substantial funding of the activities of a[nother] entity is no[t] * * * persuasive * * * in demonstrating that the State is responsible for decisions made by the entity in the course of its business." *Blum* v. *Yaretsky*, 457 U.S. at 1011. See also *Polk County* v. *Dodson*, 454 U.S. 312 (1981).

LEAA funding provided not a "substantial" amount of the revenues of the recipients but only a minor proportion. And far from exercising extensive and detailed supervision, the LEAA was specifically forbidden, by statute, from "exercis[ing] any direction, supervision, or control over any police force or any other law enforcement and criminal justice agency of any State or political subdivision thereof" (42 U.S.C. 3766(a)).[15] In

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(D.C.), summarily aff'd *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971). The reasoning of *Gautreaux* v. *Romney* was rejected by this Court in *Washington* v. *Davis*, 426 U.S. at 245 n.12. The three-judge district court in *Green* v. *Connally* (which was also decided before *Washington* v. *Davis*) expressly declined to reach any constitutional issue. See 330 F. Supp. at 1164-1165; *id.* at 1171 ("Our decree will have no declaration of constitutional rights"). See also *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 23-24 n.24.

[15] The government programs involved in *Rendell-Baker* and *Blum* not only were the dominant source of funds but extensively regulated the recipients (see *Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1008-1010); the Court nonetheless ruled

view of these explicit statements by this Court, the court of appeals cannot have been correct in concluding that the mere distribution of relatively modest funds to agencies that allegedly discriminate, in the context of other civil rights enforcement measures, violates the Constitution. In fact, the court of appeals' holding represents a dramatic innovation in the constitutional law governing the activities of federal and state governments and their officials. It therefore fully warrants plenary review.

2. Under *Harlow*, respondents' complaint should have been dismissed on grounds of qualified immunity unless it alleged a violation of "clearly established * * * constitutional rights" (457 U.S. at 818). Even if the complaint states a claim under the Fifth Amendment, the court of appeals' ruling that petitioners violated a clearly established constitutional prohibition is palpably erroneous. Further, the error was committed in a case remanded for the very purpose of reconsideration in light of *Harlow*. This Court should make it clear that lower courts are not to defeat or evade the rules established in *Harlow* by conjuring up a "clearly established" constitutional right where none exists.

The arguments we have made in showing that the complaint failed to state a claim demonstrate, *a fortiori*, that the complaint does not allege a violation of clearly established rights. But beyond that, the court of appeals' own discussion betrays on its face the absence of any clear standard. The court acknowledged, for example, that "equal protection principles do not prohibit the provision of *all* forms of government services provided to discriminatory institutions" (App., *infra*, 21a n.61); but the court never specified any clear principle that distinguishes permissible from impermissible forms of aid, much less showed that such a principle had become well established in the law.

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that the recipients' activities could not be imputed to the government.

Similarly, in describing the constitutional standard that was to be applied to petitioners' alleged conduct, the court stated: "The proper inquiry is whether the relationship between the federal government and the [discriminatory] activity * * * is of such nature that the activity will be treated as an action of the government. * * * [T]he issue [is] whether funding is a form of involvement that requires us to impute the actions and motives of the local agencies to the federal government" (App., *infra*, 23a-24a). It is immediately clear that these formulations do not clearly establish anything. No reasonable official, if told that these were the constitutional rules he was obligated to apply, would have had any idea which forms of governmental support to discriminatory recipients were permissible and which were not. And, as we have shown, the court of appeals' ultimate conclusion that funding is per se an impermissible form of aid, far from being clearly established, not only lacked support but was directly contrary to rulings of this Court (see pages 15-17 and note 14, *supra*).

In *Harlow*, this Court repeatedly emphasized the importance of not permitting insubstantial *Bivens* actions to be prolonged. See 457 U.S. at 813, 814, 815-816, 817-818. "Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure" (*id.* at 820 n.35). The Court also emphasized the corrosive and "peculiarly disruptive" effects of permitting inquiries into the state of mind of an official (*id.* at 817). It was for these reasons that the Court modified the definition of qualified immunity and ordered that a *Bivens* complaint be dismissed unless it alleged a violation of clearly established rights.

The court of appeals, acting under this Court's express direction to reconsider its earlier decision in light of *Harlow*, invented a clearly established constitutional right and remanded for an inquiry into petitioners' state of mind. This eviscerates *Harlow*. *Harlow* will have little meaning if courts of appeals can engage in tendentious legal reasoning—stretching some of this

Court's decisions beyond the limits of their logic while ignoring others, failing to resolve obvious doctrinal inconsistencies and tensions, and formulating purported standards that provide no practical guidance—and then pronounce the outcome of that process "clearly established."

3. In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court held that "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts" (*id.* at 515). This Court previously granted certiorari to determine whether petitioners' functions were analogous to those of a prosecutor in the requisite sense; that question is no less worthy of the Court's review now.

Petitioners were like prosecutors because they were responsible for determining whether to initiate a formal enforcement proceeding, leading to a sanction (the termination of funds) imposed on account of unlawful activity (discrimination). In *Butz*, the Court noted that officials exercising judicial and quasi-judicial functions require absolute immunity because "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree" (438 U.S. at 512). Similarly, any controversy over politically sensitive subjects like federal funding and discrimination that could not be resolved by conciliation, even after the intercession of the chief executive of a state, would not be easily capped by an administrative proceeding and order. There would be "a serious danger [of] * * * a retaliatory response" (*id.* at 515); for example, local government officials, who are not even restrained by the budgetary constraints of private parties (see *ibid.*) might well think it advantageous to respond to a funding termination by filing a well-publicized *Bivens* action against the responsible federal officials.

Petitioners, of course, are being sued because they did *not* initiate proceedings; but the Court has left no doubt that the absolute immunity for quasi-prosecutorial functions must apply to such decisions as well. Just as a criminal prosecutor has absolute immunity "in deciding which suits to bring" (*Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976); see *id.* at 426 n.24, 432 n.33), so an administrative official may not be held personally liable for his decision "whether a proceeding should be brought" (*Butz*, 438 U.S. at 515). The reason is apparent: under any other approach, the official's decisions would be biased in favor of initiating proceedings. "The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete" (*ibid.*).

The court of appeals did not dispute any of these propositions. Instead, it denied absolute immunity to petitioners because it concluded that the enforcement provisions of the Crime Control Act gave them "virtually no discretion" (App., *infra*, 39a). In its later opinion, however, the court of appeals—discussing the statute in a different context—apparently retreated from this position (see *id.* at 17a) and acknowledged what is apparent from the statute, that petitioners were responsible for making important discretionary judgments at several stages of the enforcement scheme. As the court of appeals belatedly recognized, petitioners had to determine whether a recipient "failed to comply with" the nondiscrimination provisions, so that the chief executive of the state was to be notified; petitioners then had to decide whether "a reasonable time" had elapsed after such notification, so that efforts at conciliation were to be abandoned; and, if termination proceedings were instituted, petitioners had to decide whether there was a sufficiently "substantial" failure to comply to justify

fund termination. See 42 U.S.C. (1970 ed., Supp. V) 3757, 3766.

These discretionary determinations were central to the enforcement scheme, and even if petitioners exercised no other discretion, they would be entitled to absolute immunity. But the court of appeals erred in its conclusion that petitioners were without underlying discretion in implementing the funding termination scheme. It is implausible to suppose that Congress intended to impose on the LEAA a rigid requirement that—once ~~ones~~ it had made certain preliminary determinations—it institute a funding termination proceeding in *every* case, no matter how limited the LEAA's enforcement resources or how sound its judgment that those resources could be better devoted to other cases. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n.41 (1979).

The court of appeals based its contrary conclusion primarily on the statute's use of the word "shall." See App., *infra*, 13a, 39a. But as Judge Tamm pointed out (*id.* at 50a n.12), most criminal statutes provide that a person who commits an offense "shall" be punished (see, *e.g.*, 18 U.S.C. 371, 1001); and 28 U.S.C. 547(1) provides that United States Attorneys "*shall* * * * prosecute for all offenses against the United States" (emphasis added). It is nonetheless well settled that a federal prosecutor has broad discretion, unreviewable by the judiciary, not to prosecute even if there is substantial evidence of guilt. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.). Similarly, this Court has repeatedly observed that administrative prosecutors possess a comparable broad discretion notwithstanding the seemingly mandatory language of the statutory schemes they are responsible for enforcing. See, *e.g.*, *Marshall* v. *Jerrico, Inc*, 446

U.S. 238, 248 (1980); *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-573 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958).[16]

4. The court of appeals engaged in an extended discussion of the question whether petitioners violated clearly established statutory rights (App., *infra*, 8a-20a), without ever explaining why it considered this discussion necessary. We note that respondents have previously asserted (80-1074 Br. 32 n.32) that the court of appeals found an implied cause of action for damages under the Crime Control Act. Although the court of appeals never addressed the existence of such an implied remedy in either of its opinions, the court's discussion of whether petitioners violated clearly established statutory rights might be viewed as resting on the unarticulated premise that respondents have such a cause of action. In order to forestall respondents from pursuing this argument in future proceedings, thus possibly necessitating further prolonged litigation, we urge this Court to review the question whether respondents may

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[16] The legislative history of the Crime Control Act also belies the court of appeals' conclusion. The funding termination provision—Section 509, 42 U.S.C. (1970 ed.) 3757—was enacted in 1968 and remained unchanged throughout the period relevant to this litigation. Although that provision always used the word "shall," the House Report accompanying the Act explained that "the Attorney General *may* terminate or suspend payments * * * on a finding [that] there is a substantial failure to comply" and that he has "broad discretionary power" over the funding termination process (H.R. Rep. 488, 90th Cong., 1st Sess. 14, 26 (1967) (emphasis added); see also S. Rep. 1097, 90th Cong., 2d Sess. 85 (1968)).

In 1976, at a time when, according to the court of appeals, the LEAA had "virtually no" discretion under the enforcement scheme, Congress again amended the scheme precisely because it thought the LEAA had *too much* discretion (see, *e.g.*, H.R. Rep. 94-1155, 94th Cong., 2d Sess. 11, 25-27 (1976); 122 Cong. Rec. 28498 (1976) (remarks of Rep. McClory)).

pursue a personal damages remedy against petitioners on the basis of the Crime Control Act alone.

An implied *statutory* cause of action for damages against federal officials in their personal capacities would be novel indeed. An official's alleged failure correctly to administer a statute is generally reviewable under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, not in a suit for personal damages against the official. Indeed, we know of no occasion on which a court has permitted a personal damages recovery from officials who did nothing more than violate the statute they were charged with implementing. Nothing in the language or the legislative history of the civil rights enforcement scheme of the Crime Control Act suggests that Congress intended to create such a novel remedy here.[17]

5. The court of appeals' failure to respect the letter and spirit of *Harlow* is magnified by its erroneous conclusion that respondents have standing to maintain this action. The costs and burdens of insubstantial and unwarranted *Bivens* actions are multiplied if such suits can be brought by all comers who feel aggrieved by the actions of government officials, no matter how remote, indirect, and attenuated the connection between the plaintiff's injuries (if any) and the actions of the defendant officials.

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[17] Even if there were a statutory cause of action against petitioners, they would be entitled to absolute immunity, because of their quasi-prosecutorial functions, and to qualified immunity. The court of appeals' ruling that petitioners violated clearly established statutory rights was based on its conclusion that the Crime Control Act left petitioners with only "limited discretion" (App., *infra*, 17a). For the reasons we stated in our discussion of the absolute immunity question (pages 20-22, *supra*), this conclusion is erroneous. For the same reasons, we submit that respondents have failed to state a claim under the Crime Control Act.

Indeed, in this case it has been unclear throughout the years of litigation just how and why petitioners' actions have injured respondents. This is an unacceptable defect in a suit seeking crushing personal damages from high government officials. See *Butz*, 438 U.S. at 507-508.

It appears to be respondents' claim that petitioners are liable for the discriminatory acts committed against respondents by recipient police departments because the continued funding of the recipients by the LEAA "perpetuated" that discrimination. See Complaint, para 41(b); J.A. 26. This claim is indistinguishable from that of the plaintiffs in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The plaintiffs in *Eastern Kentucky* sued the government, claiming that its decision to extend favorable tax treatment to a category of hospitals that did not provide free services to indigents "encouraged" certain hospitals in that category to deny services to the plaintiffs because of their indigency (see *id.* at 32-34). This Court held that the plaintiffs lacked standing.

Respondents, like the *Eastern Kentucky* plaintiffs, were allegedly injured by recipients of benefits from the government. Respondents' allegation that the LEAA funding "perpetuated" discrimination—like the *Eastern Kentucky* plaintiffs' allegation of "encouragement"—is "unadorned speculation [that] will not suffice to invoke the federal judicial power" (426 U.S. at 44). That is because "[i]t is purely speculative whether the [discrimination] specified in the complaint can fairly be traced to petitioners' [actions] or instead result[s] from decisions made by the [recipients] without regard to the * * * implications" for their continued ability to receive federal funds (*id.* at 42-43). The allegedly discriminating recipients might well have chosen to forgo federal funds instead of changing their employment practices. See *Guardians Ass'n* v. *Civil Service Comm'n*, No.

81-431 (July 1, 1983), slip op. 14 (opinion of White, J.); *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981).

Indeed, the recipients' alleged discriminatory practices generally antedated the LEAA; LEAA funds accounted for only a small percentage of their budgets; and, according to the complaint itself, the recipients resisted all of the petitioners' efforts to obtain compliance. In these circumstances it is not only speculative but quite implausible to suppose that funding termination would have prompted the recipient law enforcement agencies suddenly to change their practices. Because respondents cannot "'establish that, in fact, the asserted injury was the consequence of [petitioners'] actions'" (*Eastern Kentucky*, 426 U.S. at 44-45, quoting *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975)), they lack standing. See also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973)).

Bivens litigation must not be allowed to be endless; otherwise the salutary reforms sought to be instituted by this Court in *Harlow* will be set wholly at naught. The Court should grant review in order to consider whether this unjust and disruptive litigation, which has for nine years burdened former government officials who served their country with distinction, should not now be brought to an end.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, INC., *et al.*, *Appellants*

v.

RICHARD W. VELDE, *et al.*

On Remand from the United States Supreme Court
(D.C. Civil Action No. 75-1444)

Decided June 30, 1983

Before: TAMM, *Circuit Judge*, BAZELON, *Senior Circuit Judge*, and PARKER,* *United States District Court Judge.*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

Dissenting opinion filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge:* The Supreme Court vacated and remanded this case[1] for further consideration in light of its recent decision in *Harlow & Butterfield v. Fitzgerald.*[2] The remand requires that we address the following question:[3] Did appellees have "clearly established" statutory or constitutional duties to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully on the basis of race and sex? The liability standard announced in *Harlow* entitles appellees to qualified immunity on summary judgment unless such clear duties existed.

Appellants allege that "termination" duties existed under Title VI of the Civil Rights Act of 1964, the Crime Control Act of 1973, and the due process clause of the fifth amendment. We find that such a duty was not clear under Title VI, but that clear duties to terminate funding existed under both the Crime Control Act and the fifth amendment. Accordingly, appellees are entitled to summary judgment with respect to appellants' claims for damages under Title VI, but not for

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[1] 102 S. Ct. 3503 (1982).

[2] 102 S. Ct. 2727 (1982).

[3] Our earlier opinion, National Black Police Ass'n v. Velde, 631 F.2d 784 (D.C. Cir. 1980), addressed three issues: Mootness, standing, and official immunity. Because the mootness and standing issues are unaffected by *Harlow*, we reinstate our earlier opinion with respect to those issues. We note that the termination of the Law Enforcement Assistance Administration since our last opinion may raise new questions concerning mootness with respect to appellants' claims for injunctive and declaratory relief. Because the parties have not addressed this issue in their supplemental briefs, however, we leave it to the district court to decide any mootness issues that may have arisen since our earlier opinion.

the damage claims under either the Crime Control Act or the fifth amendment.

BACKGROUND

Prior Proceedings

Appellants, six blacks and six women, filed this lawsuit on September 4, 1975. They alleged that federal agencies and officials had violated appellants' constitutional and statutory rights by continuing to provide financial assistance to local law enforcement agencies that discriminate on the basis of race and sex. They claimed that this continued funding violated, *inter alia*, Title VI of the Civil Rights Act of 1964 (Title VI),[4] sections 518(c) and 509 of the Crime Control Act of 1973 (the Crime Control Act),[5] and the due process clause of the fifth amendment (fifth amendment). Appellants sought declaratory and injunctive relief against the Law Enforcement Assistance Administration (LEAA),[6] the Department of Justice, and four officials in those agencies. They also sought compensatory and punitive damages against the individual officials for alleged willful and knowing violations of their constitutional and statutory rights.[7]

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[4] 42 U.S.C. §§ 2000d-2000d-4 (1976)

[5] Pub. L. No. 93-83, §§ 509, 518 (c), 87 Stat. 197, 211-12, 214 (amended 1976). The Crime Control Act of 1973 amended provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title I, 82 Stat. 197 (amended version at 42 U.S.C. §§ 3701-3797 (Supp. V 1981)).

[6] The LEAA, an agency within the Department of Justice, was created by Congress in 1968 to assist community and citizen groups in their law enforcement and criminal justice activities. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title I, 82 Stat. 197.

[7] Amended Complaint at p. 35, Appendix 38. All references to the Appendix (App.) refer to the appendix filed in National Black Police Ass'n v. Velde, 631 F.2d 784 (D.C. Cir. 1980).

On December 8, 1976, the district court granted appellees' motion for dismissal.[8] The court held that plaintiffs' claims for declaratory and injunctive relief had "been rendered moot by virtue of the enactment of the Crime Control Act of 1976,"[9] which altered the statutory duties in question.[10] The court also held that appellants' damage claims against the individual officials were "barred by the doctrine of official immunity."[11]

The Supreme Court's subsequent decision in *Butz v. Economou*[12] limited the scope of official immunity available to government officials. The Court held that as a general rule, federal officials are entitled only to a qualified immunity in suits alleging constitutional violations. To escape liability, a defendant official must establish a good faith basis and reasonable grounds for his conduct.[13] The Court identified a limited exception to this general rule for administrative officials performing judicial and prosecutorial functions, reasoning that absolute immunity was necessary to protect discretionary prosecutorial decisions from the potentially distorting effect of threats of civil liability.[14]

On appeal of the district court's dismissal of the instant case, appellees argued that their discretion in administering the LEAA funds brought them within the narrowed realm of absolute immunity identified in *Butz*. Based on the mandatory language of the statute and appellees' constitutional duty not to use federal

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[8] 3 App. 479-80.

[9] *Id.* at 479.

[10] *See* Pub. L. No. 94-503, § 122(b), 90 Stat. 2407, 2418-21 (1976).

[11] 3 App. 480.

[12] 438 U.S. 478 (1978).

[13] *Id.* at 507. *Accord* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[14] 438 U.S. at 512-17.

funds in a discriminatory manner, the court found the funding termination provisions to be mandatory, "outside the realm of discretion"[15] and that absolute immunity was therefore inappropriate.[16] Accordingly, the case was remanded for appellants to prove their claims and for appellees to demonstrate the factual basis for a qualified immunity.

Appellees petitioned for review to the Supreme Court and the Court granted certiorari. While the case was pending, the Court decided *Harlow & Butterfield v. Fitzgerald*,[17] which significantly altered the law of official immunity. Shortly thereafter, the Court vacated our judgment in the instant case and remanded "for further considertion in light of *Harlow & Butterfield v. Fitzgerald.*"[18] We requested the parties to file supplemental briefs on the matter.

Harlow & Butterfield v. Fitzgerald

Harlow substantially altered the standards governing motions for summary judgment in cases involving claims of qualified immunity. However defined, qualified immunity strikes an uneasy balance between two competing concerns: (1) the need to protect individual rights from official abuse, and (2) the need to shield well-meaning officials "from potentially disabling threats of liability."[19] The Court in *Harlow* reiterated that the latter concern requires quick resolution of insubstantial claims against government officials,[20] and

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[15] 631 F.2d at 787 n.15.

[16] The Court also reversed the district court's decision that the case was moot and rejected appellees' argument that appellants lacked standing. *Id.* at 787.

[17] 102 S. Ct. 2727 (1982).

[18] 102 S. Ct. 3503 (1982).

[19] 102 S. Ct. at 2732.

[20] *Id.* at 2737. *See* Butz v. Economou, 438 U.S. 478, 507-08 (1978).

noted that the existing qualified immunity standard had not adequately accomplished this objective.

Prior to *Harlow*, summary judgment on questions of qualified immunity generally required both subjective and objective determinations. Summary judgment was denied if there was a factual dispute about whether an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury...."[21] By alleging that an official acted with malicious intent or with a belief that a clear standard prohibited such conduct, plaintiffs could create a factual dispute that frequently required a subjective determination necessitating a trial. The need for such determinations thus frustrated the goal of terminating insubstantial lawsuits on summary judgment.[22]

Harlow adjusted the summary judgment standard to make it rely on objective factors. Under the new standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known."[23] On summary judgment, a court must first determine whether the rights allegedly violated were clearly established in the law.[24] That determination is purely legal. If the court finds that the rights were clearly es-

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[21] Wood v. Strickland, 420 U.S. 308, 322 (1975).

[22] The court noted, 102 S. Ct. at 2737-38, that several courts have considered an official's subjective good faith as inherently requiring resolution by a jury. *E.g.*, Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).

[23] 102 S. Ct. at 2738 (emphasis added).

[24] *Id.* at 2739.

tablished, and that there is a genuine dispute over material facts, summary judgment must be denied. In subsequent proceedings, a defendant can still obtain qualified immunity by showing that because of "extraordinary circumstances" he neither knew nor should have known that his conduct was unlawful.[25]

Applying this standard to the instant case,[26] we must determine whether appellees' failure to terminate funding to local law enforcement agencies violated statutory or constitutional duties clearly established at the time the failure occurred. We find that appellants' allegations, judged in their most favorable light, allege violations of statutory and constitutional rights which were clearly established at the time they allegedly occurred. Summary judgment is therefore denied.[27]

ANALYSIS

Application of the Harlow *Standard*

Appellants contend that appellees' failure to terminate funding to discriminatory agencies violated clear

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[25] *Id.*

[26] This case is technically before us on the district court's grant of a motion to dismiss. We adhere to our earlier position that absolute immunity is inappropriate and that the dismissal is to be reversed. However, because in the district court appellants had moved in the alternative for summary judgment, and because they argue that they are entitled to summary judgment as a matter of law, we will reach the question of whether summary judgment is appropriate.

[27] The district court has not yet ruled whether appellants' complaint states a claim upon which relief can be granted. We did not address this issue in our first opinion, and the issue has not been briefed for us. We therefore do not view the issue as properly presented for our decision in the present posture of this case.

duties imposed on them by three independent sources of law.[28] We consider each of these sources in turn.

Title VI

Section 601 of Title VI prohibits recipients of federal financial assistance from engaging in racial discrimination:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[29]

The Act also prescribes measures to be taken by federal funding agencies against recipients who disregard this prohibition.[30] Of particular relevance is 42 U.S.C. § 2000d-1:

> Compliance with any requirement adopted pursuant to this section may be effected (1) *by the termination of or refusal to grant or to continue assistance* under such program or activity to any recipient as to whom there has been an express finding on the record, after opportuniuty for hearing, of a failure to comply with such requirement, ... or (2) *by any other means authorized by law.*

(emphasis added). Appellants contend that this provision imposed on appellees a clear duty to terminate funds to agencies that unlawfully discriminate.

On its face, however, the statutory language is not mandatory. Section 2000d-1 allows the funding agency to effect compliance through funding termination or "any other means authorized by law." Although fund

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[28] Appellants have not argued that Congress has in any way altered the common law standards for immunity with respect to the causes of action alleged in this case.

[29] 42 U.S.C. § 2000d (1976).

[30] 42 U.S.C. § 2000d-1 to 2000d-4 (1976).

termination was envisioned as the primary means of enforcement under Title VI,[31] and although it has proven very effective as a deterrent to discrimination,[32] Title

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[31] *See Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1544 (1963) (testimony of Sec'y Celebrezze, HEW); id. at 1786-88 (testimony of George Meany, AFL-CIO); *id.* at 1890-91 (testimony of Joseph Rauh, ADA); *id.* at 2161 (testimony of Roy Wilkins, NAACP) [hereinafter referred to as *Subcommittee Hearings*]. The wording of Title VI indicates a preference for the fund cutoff remedy. Not only is fund termination mentioned first, but it is the only sanction specifically named. 42 U.S.C. § 2000d-1 (1976). The preference for fund termination under Title VI is noted in, *e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 853 (5th Cir. 1966) ("Congress was dissatisfied with the slow progress inherent in the judicial adversary process.... [and] therefore fashioned a new method of enforcement."); REPORT OF THE WHITE HOUSE CONFERENCE, TO FULFILL THESE RIGHTS 63 (1966) ("administrative proceedings prescribed by Congress as the primary device of enforcing Title VI"); VI UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 22-24, 386-88 [hereinafter cited without cross-reference as VI COMMISSION REPORT—1974]; Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 827 (1968); *Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report*, 41 NOTRE DAME LAW 906, 922-24 (1966).

[32] Early use of the sanction by HEW is instructive. Between July, 1964 and March, 1970, HEW initiated approximately 600 administrative proceedings against school districts found not to be in compliance with section 601 standards. In 400 of these cases, HEW found that the districts came into compliance following threat of termination, with no need for actual termination. Among the 200 cases in which funds were actually cut off, HEW subsequently determined that compliance had been achieved, and federal assistance was resumed in all but 4 districts. VI COMMISSION REPORT-1974, at 384-85. *See* Adams v. Richardson, 480 F.2d 1159, 1163 n.4 (D.C. Cir. 1973) (en banc); Tomlinson & Mashaw, *The Enforcement of Federal Standards*

VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient.[33] The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.[34]

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in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement, 58 VA. L. REV. 600, 619 (1972); Comment, *supra* note 31, at 871.

[33] H.R. REP. No. 914, 88th Cong., 1st Sess. 86 (1963). *See* Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982). The Guidelines also suggest a number of administrative alternatives to funding termination. *Id.*

[34] *Subcommittee Hearings*, *supra* note 31, at 1381-82 (testimony of Att'y Gen. Kennedy), 1544 (testimony of Sec'y Celebrezze, HEW), 1890 (statement of Rep. Celler); 110 CONG. REC. 2467 (1964) (statement of Rep. Gill).

The grant of a choice of remedies was also an attempt to accommodate competing views. Some civil rights advocates felt that funding termination should be mandatory. They saw in the relatively unbridled discretion of the agencies the potential for the abuse by a program-oriented bureaucracy or an inactive administration. *See, e.g.*, *Subcommittee Hearings*, *supra*, at 2093-94 (testimony of Sidney Zagri, Teamsters Union), 2352 (statement of Rep. Halpern). As Roy Wilkins, Executive Secretary of the NAACP, explained:

> [W]e always shy away from "discretionary" in these areas. We feel that unless [funding termination] is made mandatory, all sorts of discretion will be exercised and until it is demonstrated in good faith that discretion means discretion and does not mean discrimination, then we would want mandatory phraseology in there.

Id. at 2161. Others opposed the funding termination remedy either on the grounds that it would jeopardize minority-oriented programs or that it would be an unwise or unconstitutional assumption of power by the executive. *See* 110 CONG. REC. 2466 (1964) (statement of Rep. Elliott); *id.* at 6527 (statement of Sen. Holland); *Subcommittee Hearings*, *supra* note 31, at 1583 (statement of Rep. Dorn); H.R. REP. No. 914, 88th Cong., 1st Sess. 64, 86 (1963).

Faced with this statutory discretion, we cannot say that appellees' failure to terminate funding violated a clearly established statutory duty under Title VI.

Adams v. Richardson,[35] on which appellants rely heavily, does not establish clear law to the contrary. In that case, officials of the Department of Health, Education, and Welfare (HEW) insisted that enforcement of Title VI was entirely committed to agency discretion and that an agency's decision to rely on voluntary compliance was therefore unreviewable in the courts. The court rejected that contention, but did not suggest that termination was the *only* available means for securing compliance. The court noted that "[t]he Act sets forth two alternative causes of action by which enforcement may be effected,"[36] and that a failed request for voluntary compliance "does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute."[37] Thus, while *Adams* makes it clear that federal funding agencies must do *something* to effect compliance, it did not clearly establish that funding termination was required.[38]

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[35] 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

[36] *Id.* at 1163.

[37] *Id.*

[38] Appellants cite several other cases from different circuits in support of their position. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), is perhaps closest on point. In that case, however, the precise question was whether the federal funding agency's "knowing acquiescence in [an] admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964." Although the court made clear that violations of both sources of law had occurred, it did not make clear whether the agency's Title VI obligations could have been satisfied by a vigorous enforcement scheme that stopped short of fund termination.

In holding that appellees' failure to terminate funding did not violate clearly established duties under Title VI, we do not imply that appellees have complied with that statute. Appellants' allegations concerning appellees' efforts to enforce their civil rights mandate paint a less than exemplary picture.[39] Compliance with Title VI might well have required appellees to pursue compliance more vigorously than they did, and injunctive relief may have been appropriate. But Title VI has been criticized as ineffective in securing civil rights, and such ineffectiveness has been attributed to the discretion in the statute precisely where appellants claim

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[39] If true, the picture is not unlike the disappointing civil rights efforts of several other federal agencies. The antipathy with which the federal bureaucracy has viewed Title VI has been documented by the Civil Rights Commission:

> The enforcement failure was the result, to a large extent, of placing the responsibility for ensuring racial and ethnic justice upon a massive Federal bureaucracy which for years had been an integral part of a discriminatory system. Not only did the bureaucrats resist civil rights goals; they often viewed any meaningful effort to pursue them to be against their particular program's self-interest.

UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 7 (1973) [hereinafter cited as COMMISSION REPORT—1973]. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1091-92 (1970) [hereinafter cited as COMMISSION REPORT—1970]; Tomlinson & Mashaw, *supra* note 32, at 619.

The Department of Justice Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982), issued in 1965, suggested alternative judicial and administrative means of enforcement and authorized fund termination only where those alternatives would be ineffective or inappropriate. The Civil Rights Commission found that every agency it examined in 1974 had failed to cut off funds in cases where termination would have been the appropriate means of enforcement. VI COMMISSION REPORT—1974, at 653, 762-97. *See* Adams v. Weinberger, 391 F. Supp. 269, 271 (D.D.C. 1975).

that there is none.[40] Because of that discretion, it was not clear that Title VI duties would be violated by a failure to terminate funds. Appellees are therefore entitled to qualified immunity for any suit based on Title VI arising out of their failure to terminate funds.

The Crime Control Act

The broad discretion over enforcement methods provided by Title VI is in sharp contrast to the mandatory language of the Crime Control Act. Section 518(c)(2) of the act stated:

> Whenever the Administration [LEAA] determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirements], it *shall* notify the chief executive of the State of the noncompliance and *shall* request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration *shall* ex-

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[40] *See*, Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights*, 85 YALE L. J. 720, 723-28 (1976).

ercise [its funding termination powers],[41] and is authorized concurrently with such exercise—

(A) to institute an appropriate civil action;

(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or

(C) to take such other action as may be provided by law.[42]

Congress enacted this statutory command in 1973, when it reviewed LEAA's initial grant of funds. In reviewing LEAA's civil rights enforcement efforts, Congress was struck by the agency's failure to follow the spirit of Title VI.[43] The number of the agency's staff as-

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[41] More precisely, the statute requires the Administration to exercise "the powers and functions provided in section 509 of this title," which states that

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) The provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
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> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration *shall* notify such applicant or grantee that further payments *shall* not be made (or in its discretion that further payments *shall* not be made for activities in which there is such failure), until there is no longer such failure.

42 U.S.C. § 3757 (Supp. V 1975) (current version at 42 U.S.C. § 3783 (Supp. V 1981)) (emphasis added).

[42] 42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976) (emphasis added).

[43] *See Hearings on the Law Enforcement Assistance Administration Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 345 (1973) (statement of Sarah Carey) [hereinafter cited as *LEAA Hearings*]; 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LAW AND DISORDER

signed to civil rights was criticized as entirely inadequate.[44] Although LEAA had received numerous complaints of discrimination by recipients, it had *never* applied any sanctions and had *never* held a compliance hearing.[45] Indeed, LEAA had *never* even promulgated procedures for such a hearing.[46] Justice Department regulations governing LEAA expressed a preference for enforcement through judicial proceedings rather than fund termination,[47] yet LEAA had apparently never referred a case to the Attorney General, and only rarely had intervened in private suits.[48]

32-36 (1973); 119 CONG. REC. 20,070-71 (1973) (statement of Rep. Jordan).

[44] Until 1971, LEAA had no civil rights office responsible for implementing its Title VI regulations; once established, the office was understaffed. *See* COMMISSION REPORT—1973, *supra* note 39, at 97; COMMISSION REPORT—1970, *supra* note 39, at 601, 634.

[45] *See* COMMISSION REPORT—1973, *supra* note 39, at 100-01.

[46] *See id.* at 100 n.27.

[47] 28 C.F.R. § 42.206(a) (1975) provided: "[W]here the responsible department official determines that judicial proceedings ... are as likely or more likely to result in compliance than administrative proceedings ... , he shall invoke the judicial remedy rather than the administrative remedy." In 1973, the Civil Rights Commission concluded that "LEAA has administratively repealed the remedy of fund cutoff." COMMISSION REPORT—1973, *supra* note 39, at 101 n. 36.

[48] 119 CONG. REC. 20,071 (1973) (statement of Rep. Jordan). In two of the suits, Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974), and Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), LEAA intervened ten months and eight months after the suits were brought and only "as a result of a great amount of external pressure ... to take some action." UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER 147 (1971). In the third case, intervention was by court order. 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 43, at 36.

Against this background, Congress created a set of more stringent enforcement requirements addressed specifically to LEAA's civil rights obligation.[49] Congress explicitly rejected President Nixon's version of the bill, which merely stated that Title VI applies to LEAA.[50] Instead, Congress adopted sections 509 and 518(c)(2), which outlined a mandatory enforcement scheme that relies on funding termination. By doing so, Congress explicitly prevented LEAA from relying on the Title VI option of "any other means authorized by law."

Representative Jordan, originator of the mandatory provision,[51] described her amendment to the act as follows:

> The effect of my amendment ... is to *require* LEAA to *first* use the same enforcement procedure which applies to any other violation of LEAA

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[49]Crime Control Act of 1973, Pub. L. No. 93-83, § 2, 87 Stat. 197, 211-2, 214 (amended 1976).

[50]*LEAA Hearings*, *supra* note 43, at 26 (text of Administration bill, S.1234, 93d Cong., 1st Sess. § 308(b)(2) (1973)).

[51]Her original amendment made two major changes: it imposed a 60-day time limit on voluntary compliance efforts, after which enforcement action was required, and it replaced the discretionary choice of sanctions permitted under Title VI with mandatory fund termination. Concurrent with termination, the agency could use other enumerated means in its efforts to obtain compliance. 119 CONG. REC. 20,071 (1973) (statement of Rep. Jordan). The Jordan version passed the house, *id.*, at 20,105, but was revised in the conference committee to accommodate the views of the Senate, which had approved the President's proposal. The statute which emerged provided for mandatory termination after a "reasonable time" rather than after 60 days, but retained the requirement that, in the words of the conference committee, "LEAA *must* initiate proceedings to cut off funds to any recipient who continues to discriminate after that period, and may, concurrently with that initiation, take other actions." SENATE CONF. REP. No. 349, 93d Cong., 1st Sess. 32 (1973) (emphasis added).

regulations or statutes. That procedure of notification hearings and negotiations is spelled out in section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.

This amendment was necessary to *reserve* LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements.[52]

Despite this statutory language and legislative history, appellees argue that the Crime Control Act provided them "broad enforcement discretion." Although their position is clearly exaggerated, some limited discretion under the statute does exist. Thus, LEAA must "determine" whether a recipient of LEAA funding has failed to comply with the statute's nondiscrimination provision and LEAA regulations. After notifying the recipient state's governor of the noncompliance, LEAA has to determine whether the governor has secured compliance "within a reasonable time." The administrator must then determine whether failure to comply is substantial, at which point some form of fund termination is mandatory.

These limited areas of discretion do not, however, render appellees' statutory obligation so unclear as to entitle them to qualified immunity as a matter of laws. Appellants have alleged, with some support, that rampant discrimination existed among recipients of LEAA funds. Many recipient agencies were involved in lawsuits alleging unlawful discrimination.[53] Other recipients reportedly pursued policies that constituted prima facie evidence of discrimination.[54] The few compliance

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[52] 119 CONG. REC. 20,071 (1973) (emphasis added).

[53] "[O]f the 50 largest police departments receiving LEAA funds, 26 were parties to [lawsuits alleging discriminatory practices]." *See* VI COMMISSION REPORT—1974, at 380.

[54] *See id.* at 377-78.

investigations conducted by LEAA allegedly turned up widespread noncompliance.[55] If such allegations are true, LEAA's obligations were clear under the 1973 amendments to the Act. Notification of the state's governor was required, and funding termination proceedings were to be instituted in cases where voluntary compliance failed. Appellants have alleged that very few (perhaps only one) notices to governors were sent, and that funding termination proceedings were never brought prior to commencement of the instant suit. In the words of the House Committee on the Judiciary, "LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to fund violators of the Act."[56]

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[55]"LEAA staff have stated that the majority of LEAA recipients it has reviewed were found to engage in some form of discriminatory practice." *Id.* at 361 n.968.

[56]Report of the House Committee on the Judiciary, H.R. REP. No. 1155, 94th Cong., 2d Sess. 11 (1976). Moreover, in a limited number of cases, LEAA did refer cases to the Justice Department. VI COMMISSION REPORT—1974, at 383. It is unclear on what basis such action would have been taken unless LEAA believed the recipient was out of compliance. The statute and congressional intent were explicit that, in such circumstances, referral to the Justice Department was to be concurrent with the initiation of fund termination proceedings.

This set of circumstances is presented most clearly with respect to the Philadelphia Police Department. On Feb. 1, 1974, appellee Herbert Rice, Director of LEAA's Office of Civil Rights Compliance, sent the Philadelphia Police Commissioner a mailgram, which stated:

> THIS WILL ALSO FORMERLY [sic] ADVISE YOU THAT LEAA HAS DETERMINED THAT THE PHILADELPHIA POLICE DEPARTMENT HAS FAILED TO COMPLY WITH [THE NONDISCRIMINATION REGULATIONS]. THE LEAA HAS FURTHER DETERMINED THAT COMPLANCE

Significantly, appellants' allegations of bad faith do not principally involve appellees' exercise of judgment in those areas where appellees contend the Act is ambiguous. Appellants' claims are not based on either appellees' application of the "reasonable time" allowance for effecting voluntary compliance, or the "substantial failure" determination that ultimately makes termination mandatory. Rather, the allegations involve principally the failure of LEAA officials to notify the governors of states where recipients were discriminating, and to institute administrative funding termination proceedings where they had determined that voluntary efforts would not succeed. The purpose of qualified immunity is to protect officials from liability where ambiguity in the law prevents them from knowing how properly to carry out their duties. We do not see how such ambiguity affected the appellees in this case.

It is true, of course, that the enforcement procedures of 518(c)(2) only begin "[w]henever the Administation [LEAA] determines" that a failure to comply exists. This language does not mean, however, that LEAA could avoid its enforcement obligations by refusing to "determine" that noncompliance existed. It is one thing for an agency to proceed cautiously because of the possible consequences of terminating funds. It is something quite different to abdicate the civil rights enforcement role that Congress clearly intended LEAA to

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WITH THE REGULATIONS CANNOT BE ACHIEVED BY VOLUNTARY MEANS.

ACCORDINGLY, THIS MATTER HAS BEEN REFERRED TO THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE FOR CONSIDERATION OF THE INSTITUTION OF APPROPRIATE LEGAL PROCEEDINGS.

App. 91. Appellees have not offered a satisfactory explanation for why, in light of the language of § 518(c)(2), funding termination proceedings were not instituted concurrent with the referral of the case to the Justice Department.

play. Appellants have alleged and provided some support showing that unlawful discrimination among funded agencies was rampant and that LEAA officials were aware of that fact. A wholesale refusal to make the determinations clearly contemplated by the Act might well defeat a claim of good faith.

The Fifth Amendment

In addition to any statutory duties appellees may have had, appellants assert that appellees had a constitutional duty not to fund local law enforcement agencies known to be discriminating. Appellants derive this duty from the due process clause of the fifth amendment, which makes applicable to the federal government the equal protection limitations that the fourteenth amendment places on the actions of states. Although appellants will have the burden of establishing several difficult issues of fact,[57] it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating.

Equal protection principles bar federal officials, like state officials, from engaging in racial discrimination.[58] This constitutional obligation applies not just to direct involvement, but also to government "support" of discrimination "through any arrangement, management, funds or property."[59] Activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.[60] This prohibition encompasses various forms of support

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[57] *See infra* pp. 25-26 & note 77.

[58] Bolling v. Sharpe, 347 U.S. 497 (1954).

[59] Cooper v. Aaron, 358 U.S. 1, 19 (1958). *See* Norwood v. Harrison, 413 U.S. 455, 467 (1973).

[60] Norwood v. Harrison, 413 U.S. 455, 465 (1973).

that are much less direct than the funding involved in this case.[61]

Appellants contend that because their purpose in funding law enforcement agencies is the constitutionally permissible goal of promoting law enforcement, the fact that recipients of their funds discriminate does not make the funding itself unconstitutional. It is clear, however, that a government entity may not fund a discriminating entity simply because the government's purpose is benevolent. In *Norwood v. Harrison*,[62] a case examining the constitutionality of a state providing free textbooks to private schools that practice racial discrimination, the Court emphatically stated, "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."[63]

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[61]Many forms of support have been found unconstitutional in the frequently litigated field of government involvement with segregated schools. *See id.* (free textbooks for racially discriminating private schools); Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C.), *aff'd*, 393 U.S. 222 (1968) (state tuition grants to students attending racially discriminatory schools); Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) (same); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-78 (M.D. Ala) (same), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967); cf. Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.) *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (tax exceptions to discriminatory private schools).

As the Court pointed out in *Norwood*, however, equal protection principles do not prohibit the provision of *all* forms of government services provided to discriminatory institutions. 413 U.S. at 465. For example, the Constitution does not prohibit the provision of generalized services over which the state has an operating monopoly, such as electricity, water, and police and fire protection. *Id.*; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

[62]413 U.S. 455 (1973).

[63]*Id.* at 466.

Appellants suggest that these firm constitutional principles, reiterated in *Norwood*, were tacitly changed by the Supreme Court opinions in *Personnel Administrator of Massachusetts v. Fenney*,[64] and *Washington v. Davis*.[65] These cases held that government action that has only a discriminatory effect does not constitute a violation of equal protection guarantees. To establish such a violation, it must also be shown that the government action had an invidiously discriminatory purpose. Appellees contended that the holdings in these cases make it constititutionally permissible for the federal government to fund discriminating agencies so long as the federal government's purpose is not the furtherance of discrimination.[66]

Fenney and *Davis* addressed completely different issues from the one addressed in *Norwood*, and we do not accept the contention that they implicitly overruled the longstanding principles on which *Norwood* is based. *Feeney* and *Davis* both involved facially neutral government practices that allegedly had a disparate impact

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[64]442 U.S. 256, 273-81 (1979).

[65]426 U.S. 229, 239-41 (1976).

[66]*Cf.* Bob Jones University v. United States, 51 U.S.L.W. 4593, 4606 n. 4 (U.S. May 24, 1983) (Rehnquist, J. dissenting) (tax exemption of racially discriminatory schools under facially neutral statute granting general exemption to schools is permissible, absent invidiously discriminatory purpose). It is unclear whether Justice Rehnquist, in his lone dissent, premises his conclusion on the view that tax exemptions are not state action. *See* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970). If, however, Justice Rehnquist intends to extend this principle to clear instances of active state involvement with purposive discriminators, then a number of well-established precedents would have to be overrulled. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974); Norwood v. Harrison, 413 U.S. 455, 466-67 (1973); Burton v. Wilmington Park Auth., 365 U.S. 715, 721-22 (1961); Cooper v. Aaron, 358 U.S. 1, 19 (1958). *See infra* pp. 22-24.

on Blacks (*Davis*) and women (*Feeney*).[67] The issues presented were whether disparate impact alone could render unconstitutional a government practice that is neutral on its face. The Court found that such practices were not unconstitutional.

In contrast, *Norwood* is just a recent example of a long line of cases concerning the constitutionality of government involvement in practices which the fifth and fourteenth amendments prohibit the government from engaging in directly.[68] The proper inquiry is whether the relationship between the government and the activity in question is of such nature that the activity will be treated as an action of the government. If so, the issue is whether the government could directly engage in the activity consistent with the Consitution. If not, the government involvement is unconstitutional, regardless of its purpose.[69] We do not suppose that the

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[67] *Davis* involved a written examination administered to applicants for positions in the District of Columbia Police Department. The examination excluded a disproportionate number of Black applicants. 426 U.S. at 234-36. *Feeney* involved a Massachusetts statute which gave qualified veterans an absolute preference over qualified nonveterans in state civil service positions. The statute had an overwhelmingly negative impact on civil service opportunities for women because so few women at the time were veterans. 442 U.S. at 259.

[68] *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); Cooper v. Aaron, 358 U.S. 1, 19 (1958).

[69] In *Norwood*, for example, the Court pointed out that the district court found that the free textbook program had been established in 1940, long before Brown v. Board of Education, 347 U.S. 483 (1954), had found segregated schools unconstitutional. From this fact, the Supreme Court's analysis proceeded on the assumption that the program was not motivated by an illegally discriminatory purpose.

Supreme Court implicitly changed these firm principles *sub silentio* in *Feeney* and *Davis*.[70]

The distinction between *Feeney* and *Davis* and *Norwood* can be illustrated with reference to the instant case. Appellants allege that agencies receiving LEAA funds practiced unconstitutional discrimination. *Feeney* and *Davis* make clear that for such to be true, the discrimination must be purposeful. If such discrimination does exist, however, the issue then becomes whether funding is a form of involvement that requires us to impute the actions and motives of the local agencies to the federal government. Although some forms of government involvement are sufficiently indirect and complex that they require a careful balancing of factors,[71] the constitutional prohibition on intentional discrimination clearly prohibits the government from funding other agencies engaged in such practices.[72]

A constitutional violation, moreover, does not arise only when it can be shown that discrimination would not have occurred in the absence of federal funds. As the Court in *Norwood* stated about aid to racially seg-

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[70]Appellees' reading of *Fenney* and *Davis* has rather startling implications. It would seem, for example, that their interpretation would allow the federal government to fund directly segregated schools as long as the purpose for doing so was educational rather than discriminatory.

[71]*See, e.g.*, Gilmore v. City of Mongomery, 417 U.S. 556 (1974) (use by segregated private schools of public recreational facilities); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (discrimination by private restaurant in publicly owned facility).

[72]*See, e.g.*, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (federal funding of discriminatory housing program violates due process); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.) (Leventhal, J.) ("Clearly the Federal Government could not under the Constitution give direct financial aid to [institutions] practicing racial discrimination."), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

regated schools, "the Constitution does not permit the state to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school."[73] Thus, in order to establish that a violation has occurred, appellants need not show that a particular instance of discrimination would not have occurred in the absence of federal funding.[74] Such a showing may be relevant in calculating damages, if any, but not to the initial question of whether a violation has occurred.

In stating these principles, two important clarifications are in order. First, the equal protection principles enbodied in the fifth amendment only prohibit federal funding of *unconstitutional* discrimination. Statutory and regulatory schemes may prohibit various forms of discrimination that are not constitutionally prohibited.[75] To the extent that appellees' duty to terminate funds is based on constitutional equal protection guarantees, that duty only extends to the funding of local agencies engaged in unconstitutional discrimination.

Second, appellees' clearly established duty to terminate funds only existed with respect to recipients that appellees *knew or should have known*[76] were engaged

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[73]The district court in that case had stressed the absence of a showing that "any child enrolled in private shcool, if deprived of free textbooks, would withdraw from private shcool and subsequently enroll in the public schools." 340 F. Supp. 1003, 1013 (1972). The Court found that fact irrelevant in deciding whether a violation had occurred. 413 U.S. at 465 (1972).

[74]In this regard we note, however, the successful experience of some other agencies, particularly HEW, in using fund termination as a method of obtaining compliance. *See* Adams v. Richardson, 480 F.2d 1159, 1163 n.4 (D.C. Cir. 1973) (en banc).

[75]*See, e.g.*, Washington v. Davis, 426 U.S. 229, 238-39 (legal standards governing discrimination under Title VII of Civil Rights Act of 1964 ar not the same as under fifth amendment).

[76]There is some suggestion in various cases that the fifth amendment imposes a duty on federal officials to police actively

in ongoing unconstitutional discrimination.[77] Such a knowledge requirement is consistent with the purpose of qualified immunity, which is to protect government officials whose limited knowledge prevents them from conducting their duties without committing occasional honest mistakes. The appropriate inquiry involves both a subjective and objective examination of the extent of appellees' knowledge. Such a subjective inquiry is not inconsistent with *Harlow*, which only precludes a subjective inquiry prior to finding that the state of the law allegedly violated was clear. Appellants can use whatever evidence is available through discovery to establish that appellees knew a particular recipient of funds was unconstitutionally discriminating.

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recipients of federal funds to ensure that they are not practicing discrimination. *See, e.g.*, NAACP, Western Region v. Brennan, 360 F.Supp. 1006, 1012 (D.D.C. 1973) ("the Fifth Amendment impose[s] upon federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State and local agencies funded by them.") We take no position on the existence or extent of any such duty because we conclude that the nature of any such duty is not clearly established. We note, however, that the absence of a clear duty to investigate affirmatively does not protect individuals for actions displaying deliberate indifference to constitutional rights. *See* Carlson v. Green, 446 U.S. 15, 16-17 (1980); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

[77]This issue is, of course, simplified in cases where it is accepted that the activity receiving government support could not be practiced directly by the federal government (*e.g.*, segregated schools). The issue is much more difficult where, as here, any activity that was unconstitutional for appellees to fund was also unconstitutional for the recipients to practice. Because none of the recipients acknowledges participation in unconstitutional activities, appellants will have the difficult burden of establishing that such discrimination existed and that appellees knew of its existence.

CONCLUSION

Under the *Harlow* standard, appellees are entitled to summary judgment regarding appellants' claims for damages under Title VI. With respect to the damage claims under the Crime Control Act and the fifth amendment, however, appellants have alleged violations of "clearly established statutory and constitutional rights." For that reason, we adhere to our rejection of appellees' claim of qualified immunity at this stage of the proceeding. The case is remanded to the district court for further proceedings.

So ordered.

TAMM, *Circuit Judge, dissenting:* For the reasons stated in my prior dissenting opinion in this case, 631 F.2d at 791-94, I would hold that the individual defendants are protected by absolute immunity. Accordingly, I respectfully dissent from the majority opinion. Because the *Harlow* standard for qualified immunity does not affect my position on the defendant's absolute immunity, I need not discuss *Harlow*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

Filed June 30, 1983
No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL.

[District Court] Civil Action No. 75-1444

On Remand from the Supreme Court of the United States

Before: Tamm, Circuit Judge, Bazelon, Senior Circuit Judge, and Parker,* Judge, United States District Court for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. After this Court's initial decision was vacated by the Supreme Court of the United States and the matter was remanded for further consideration, supplemental briefs were filed and the case has come on for disposition. Upon consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the case is remanded to the District Court for further

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

proceedings in accordance with the opinion of this Court filed herein this date.

PER CURIAM
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1983.
Opinion for the Court filed by Senior Circuit Judge Bazelon.
Dissenting opinion filed by Circuit Judge Tamm.

UNITED STATES COURT OF APEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982

Filed Sept. 1, 1983
No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION ET AL.,
APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL.,
APPELLEES

[District Court] Civil Action No. 75-1444

Before: Tamm, Circuit Judge, Bazelon, Senior Circuit Judge, and Parker*, District Judge, U.S. District Court for the District of Columbia

ORDER

On consideration of the Petition for Rehearing of Appellees, filed August 15, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

PER CURIAM
FOR THE COURT:
GEORGE A. FISHER, CLERK
/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Tamm would grant the Petition for Rehearing.

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982

Civil Action No. 75-1444

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL., APPELLEES

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Appellees' Suggestion for Rehearing *en banc*, filed August 15, 1983, has been circulated to the full Court. A majority of the Judges have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

PER CURIAM
FOR THE COURT:
GEORGE A. FISHER, CLERK
/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Tamm and Wilkey would grant the Suggestion for Rehearing *en banc*.

Chief Judge Robinson and Circuit Judges Wald, Ginsburg, Bork and Scalia did not participate in this Order.

APPENDIX C

VELDE, ADMINISTRATOR, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1074. Argued December 9, 1981—Decided June 30, 1982

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMIN., ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 75-1444)

Argued January 5, 1979

Decided May 14, 1980

Before: BAZELON, *Senior Circuit Judge*, TAMM, *Circuit Judge* and PARKER*, *United States District Court Judge* for the District of Columbia

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinion concurring in part, concurring in result in part, and dissenting in part filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge:* Appellants, twelve individuals and an organization,[1] appeal the district

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The individual appellants include six blacks and six women who alleged that they were denied employment, passed over for promotion, or discharged solely on the basis of their race or sex by state and local law enforcement agencies that receive funds

court's dismissal of their complaint. They alleged that federal agencies and officials unlawfully failed to terminate federal funding of state and local law enforcement agencies despite evidence that the funds were "used to discriminate on grounds of race and sex against plaintiffs and members of their class."[2] Appellants sought declaratory and injunctive relief against the Law Enforcement Assistance Administration (LEAA),[3] the Department of Justice, and four officials in those agencies. Appellants also sought compensatory and punitive damages against the four officials in their individual capacities.[4]

Relying on the doctrines of mootness and official immunity, the district court dismissed all of appellants' claims. For reasons that appear below, we reverse.

I.

On the basis of 1976 amendments to the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Crime Control Act),[5] the district court dismissed appellants' claims for declaratory and injunctive relief as moot. We disagree.

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from the Law Enforcement Assistance Administration (LEAA). The organizational appellant is the National Black Police Association, a not-for-profit Illinois corporation with over 50 affiliates in at least 20 states.

[2] Complaint ¶ 1, Appendix (App.) 5. Plaintiffs moved for class certification, but the district court did not rule on the motion before it dismissed the action.

[3] The LEAA, an agency within the Department of Justice, was created by Congress in 1968 to assist community and citizen groups in their law enforcement and criminal justice activities. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. I, 82 Stat. 197 (1968) (current version at 42 U.S.C. §§ 3701 *et seq.* (1976)).

[4] Complaint at p. 35, App. 38.

[5] Pub. L. No. 90-351, 82 Stat. 206 (1968).

The Omnibus Crime Control Act was first amended in 1973 to require LEAA to terminate federal funding to recipients that engage in discriminatory practices.[6] In response to LEAA's failure to carry out this civil right enforcement requirement,[7] Congress amended the Act in 1976[8] by adding more detailed mandatory procedures to be followed by LEAA in either securing compliance with the Act's antidiscrimination provision or terminating funds to noncomplying recipients.

The 1976 amendments have no bearing on appellants' claims that they were injured as a result of appellees' conduct or on appellee's civil rights enforcement duties under either the Omnibus Crime Control Act or the other constitutional and statutory provisions upon which appellants base their claims for relief.[9] Thus, the 1976 amendments did not render any of appellants' claims moot and, on remand, appellants will be entitled to proceed on all causes of action stated in their complaint.[10]

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[6] Pub. L. No. 93-83, § 2, 87 Stat. 214, 42 U.S.C. § 3766(c) (1976).

[7] The House Report on the 1976 amendments stated that "[t]he response of LEAA to the 1973 civil rights amendments has been less than minimal." H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11 (1976). The report also stated that LEAA had not terminated its funding of any recipient "[]despite positive findings of discrimination by courts and administrative agencies. . . ." *Id.*

[8] Pub. L. No. 94-503, § 122(b), 90 Stat. 2418 (1976), 42 U.S.C. § 3766(c) (2) (1976).

[9] In addition to their claims under the Omnibus Crime Control Act, appellants purported to state causes of action under the fifth and fourteenth amendments; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-4 (1976); *id.* §§ 1981, 1983, 1986; and Executive Orders No. 11,246 and 11,375.

[10] Some of appellants' requests for injunctive and declaratory relief, as well as the claims for damages, are based upon allegations of LEAA's past failure to terminate funding to offending

II.

The district court dismissed appellants' claims for monetary damages against the four agency officials in their individual capacities on the ground of absolute immunity. Subsequent to the district court's decision, however, the Supreme Court limited the doctrine of official immunity. We find this case now falls outside those limits, and thus reverse the district court's dismissal of the claims for monetary damages.

In *Butz* v. *Economou*,[11] the Supreme Court held that as a general rule, federal officials obtain only a qualified immunity in suits raising constitutional violations. Instead of an absolute immunity, federal officials can be sued and can defend only on the basis of good faith and reasonable grounds for their conduct.[12]

Appellees claim they are covered by a limited exception for administrative officials performing judicial and prosecutorial functions. Recognized by the Supreme Court in *Economou*, this exception was carved out to preserve absolute immunity where "essential for the conduct of the public business." 438 U.S. 478, 507

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law enforcement agencies. These claims are utterly unaffected by the 1976 amendments. Moreover, appellees' underlying obligation to secure compliance with civil rights obligations or terminate funding is not affected by the 1976 amendments. Thus, the claims for declaratory and injunctive relief that are prospective in nature are based upon allegations of injury that have not been affected by the amendments. To the extent that these prospective claims require proof of LEAA's present failure to follow the new procedures required by the Omnibus Crime Control Act, appellants should be given the opportunity to prove such failure.

[11] 438 U.S. 478 (1978).

[12] The Court limited the availability of an absolute immunity defense to actions raising common-law tort causes of action. *See* 438 U.S. at 488-89 (construing Barr v. Matteo, 360 U.S. 564 (1959) (libel action)).

(1978). As the Court reasoned, absolute immunity is necessary to protect discretionary prosecutorial decisions from the potentially distorting effect of civil liability.[13] Appellees claim that the complaint challenges "the conduct of LEAA's prosecutorial role in enforcing civil rights law"[14] and thus should be met by a defense of absolute immunity. We cannot agree.

The purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency officials lack discretion. Appellees have virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients. The Omnibus Crime Control Act, as amended in 1973, provides that

> ... [w]henever the Administration determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirement] or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise ...

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[13] An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought....

* * * *

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from the decision was less than complete.

438 U.S. 478, 515 (1978).

[14] Appellees' Supp. Br. at 4.

its fund termination powers.[15] The minimal matters left to LEAA's judgment—such as the assessment of "reasonable time after notification"—do not rise to the level of prosecutorial discretion that is protected by absolute immunity. Accordingly, we find that appellees have only a defense of qualified immunity and reverse the district court's dismissal of the claims for monetary damages. Appellants should be allowed to go to trial on their claims for damages and appellees given a chance to establish a defense of good faith or reasonable grounds for their conduct.[16]

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[15] The mandatory language of 42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976), when read in light of appellees' constitutional and independent statutory duty not to allow federal funds to be used in a discriminatory manner by recipients, takes appellees' civil rights enforcement duties outside the realm of discretion. *See* Brown v. Califano, No. 78-1864 (D.C. Cir. Jan. 31, 1980).

[16] Appellees also raise, as they did in the district court, the issue of appellants' standing to maintain this action. The National Black Police Association's standing has not—and indeed it cannot—be challenged. It alleged harm to itself and its members as a result of appellees' alleged failure to terminate funding to discriminatory recipients. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Similarly, individual appellants have alleged violations of their right to be free from federal funding of state and local agencies that have discriminated against them. They have a sufficiently "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204 (1962), and their interest is precisely that which is protected by the Constitution and the statutes under which appellants have proceeded, Flast v. Cohen, 392 U.S. 83, 102 (1968); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). The 1976 amendments to the Omnibus Crime Control Act, which added a judicial review provision for parties such as appellants, remove any doubt as to appellants' standing, Pub. L. No. 94-503 § 122(b), 90 Stat. 2421 (1976), 42 U.S.C. § 3766(c)(4)(A) (1976), and we are satisfied that—absent a failure of proof after discovery is completed—appellants have standing to maintain this action. The district court did not rule on appel-

III.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

So ordered.

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lants' standing argument, and we expect that the district court will dispose of the pending motion to dismiss for lack of standing, along with pending motions to resume discovery and for class certification on remand.

TAMM, *Circuit Judge, concurring in part, concurring in result in part, and dissenting in part:* The majority opinion in this case deals with three issues: mootness,[1] standing,[2] and official immunity.[3] I concur in Judge Bazelon's analysis and result on the mootness question and therefore do not address that issue further. Although I also agree that plaintiffs-appellants have standing adequate to survive a motion to dismiss, I reach this result by a route different from that of the majority. On the question of whether the individual defendants are protected by absolute immunity, I dissent.[4]

I. STANDING

In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), the Supreme Court summarized the law of standing. "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Id.* at 99. Moreover,

> [e]ven when a case falls within these constitutional boundaries, a plaintiff may still lack standing under ... prudential principles [if he does not] assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens."

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[1] *See* Maj. Op. at 3-4.

[2] *See id.* at 7 n.16.

[3] *See id.* at 4-7.

[4] Congress recently enacted the Justice System Improvement Act of 1979, Pub. L. No. 97-157, 93 Stat. 1167, which amends and recodifies the statutory provisions governing the Law Enforcement Assistance Administration (LEAA). This enactment does not bear on the present action, *see id.* § 1301(3), and therefore is not addressed in this opinion.

Id. at 99-100 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). Although Congress may modify such prudential principles,[5] it may not "abrogate the Art. III

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[5] Congress has not modified these principles for actions such as the present one. Contrary to the majority's statement, *see* Maj. Op. at 7 n.16, 42 U.S.C. § 3766(c)(4)(A) (1976) does not attempt to confer standing on litigants such as the plaintiffs here. As the statute on its face suggests, and as its legislative history confirms, the provision in question only authorizes an action against *state or local* governments or officials that have discriminated in violation of 42 U.S.C. § 3766(c) (1976). No action against the federal government or its officials was intended, and thus the present suit is not authorized by this statute.

Section 3766(c)(4)(A) provides:

> Whenever a State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction. Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date of the administrative complaint was filed with the Administration, or any other administrative enforcement agency, unless within such period there has been a determination by the Administration or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

42 U.S.C. § 3766(c)(4)(A) (1976). Although the statute does not expressly state against whom "a civil action may be instituted," the language of the statute rather clearly reveals an intent to authoirize a private action only against those entities or individuals that have actually engaged in the discrimination.

The legislative history of § 3766(c)(4)(A) confirms this view. Although a House of Representatives committee report on the legislation contains a statement suggesting the availability of an action "against the United States" as well as against state and local governments and officials, *see* H.R. REP. NO. 94-1155, 94th Cong., 2d Sess. 27 (1976), the language contained in § 3766(c)(4)(A) was added by a House floor amendment *after* the House Judiciary Committee had adopted this report, *see* 122 CONG. REC. 28,513-14 (1976). In support of this floor amendment, Representative Butler stated: "[P]rivate civil actions are

minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' [*Warth* v. *Seldin*, 422 U.S. at 501], that is likely to be redressed if the requested relief is granted. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, [426 U.S. 26, 38 (1976)]." *Id.* at 100.[6]

In the present case, plaintiffs allege that state and local entities funded by the Law Enforcement Assistance Administration (LEAA) have unlawfully discriminated

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authorized against *a State government or unit of local government* where an officer or employee in an official capacity has engaged in a pattern or practice of discrimination prohibited by this section." *Id.* at 28,514 (emphasis added). The Senate version of the legislation had no provision comparable to § 3766(c)(4)(A), but the Senate agreed to the provision as part of a conference report that resolved House and Senate differences. *See* 122 CONG. REC. 33,879-84 (1976). In support of the conference report, Senator Hruska described the private-action provision contained in the report:

> [T]he act authorizes private parties to initiate civil actions in Federal or State courts against a *State government or unit of local government or any officer or employee thereof* acting in an official capacity whenever such government employee or officer has engaged or is engaging in any discriminatory act or practice prohibited by the LEAA Act. This provision is an analogy to title 42, section 19[83], United States Code, which authorizes action in Federal court against State or local officials acting under color of law.

Id. at 33,880 (emphasis added).

The fact that Congress considered the possibility of a cause of action against federal officials, but instead adopted a provision authorizing suits only against state or local officials, may well bear on the merits of plaintiffs' claims in this case. Like the majority, however, I believe it inadvisable to express any views on the merits of this case without a more complete evidentiary record and without a district court consideration of the many issues that are presented.

[6] It would seem a fine line indeed between the prudential principle that a plaintiff must assert "an injury that is peculiar to himself" and the supposedly less stringent constitutional requirement that he assert "a distinct and palpable injury to himself."

against them.[7] Being subjected to unlawful discrimination is clearly a distinct and personal injury sufficient to satisfy both article III and the prudential standing rules. The more difficult question relates to "the redressability aspect of standing," *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, No. 79-1123, slip op. at 7 (D.C. Cir. Feb. 8, 1980), which is part of "the Art. III minima," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100.[8] Under this aspect of the

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[7] Plaintiffs also claim that the Government's standing argument is wrong for the simple reason that it has a mistaken premise, namely, the statement that plaintiff's "alleged injuries" are the "alleged racial discrimination by certain state and local law enforcement agencies." This is *not* the legal injury which forms the basis of *this* lawsuit. Rather, the legal injury which plaintiffs suffer is defendants' knowing funding of discriminatory law enforcement agencies in contravention of constitutional and statutory obligation owed by *defendants* to plaintiffs.

Reply Brief for Appellants at 27 (emphasis in original). In making this claim of injury, plaintiffs expressly eschew any reliance on their status as taxpayers. Transcript of Oral Argument at 6.

This claim of injury must be rejected. If plaintiffs are saying that their injury derives from being discriminated against with federal, as opposed to state or local, funding, their supposed "injury" is too tenuous and abstract to suffice as a basis for standing. If, on the other hand, they are claiming an injury merely in the fact that the defendants fund unlawful discrimination, without regard to whether they personally are victims of the discrimination, this does not constitute " 'a distinct and palpable injury to [themselves],' " Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)), let alone "an injury that is peculiar to [themselves] or to a distinct group of which [they are] a part, rather than one 'shared in substantially equal measure by all or a large class of citizens,' " *id.* at 100 (quoting Warth v. Seldin, 422 U.S. at 499). Such a generalized grievance simply does not constitute sufficient "injury" for the purpose of standing to sue in the federal courts.

[8] Because this aspect of standing is constitutionally required, the presence of a statute attempting to modify this rule would not be controlling. *See also* notes 5-6 *supra*.

standing doctrine, a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 38. In other words, "there [must be] a 'substantial likelihood' that the relief requested will redress the injury claimed...." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). As this court has observed, recent Supreme Court cases "reveal[ ] the seriousness with which the Supreme Court has taken" this aspect of standing. *Greater Tampa Chamber of Commerce* v. Goldschmidt, slip op. at 7. *See also NACCP, Boston Chapter* v. *Harris*, 607 F.2d 514, 520-22, 524 (1st Cir. 1979).

In arguing that plaintiffs lack standing, the Government relies heavily on *Simon* v. *Eastern Kentucky Welfare Rights Organization*. In *Eastern Kentucky*, a group of indigents contended that the Internal Revenue Service had violated its statutory obligations by granting favorable tax treatment to nonprofit hospitals even though the hospitals denied most services to indigents. The Court found that the indigents lacked standing, because it was "purely speculative" that a favorable court decision would redress their injuries: "So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." 426 U.S. at 42-43.

The Government argues that the *Eastern Kentucky* rationale applies in the present case

> since [plaintiffs] cannot show that their alleged injuries (alleged racial discrimination by certain state and local law enforcement agencies) are likely to be redressed by a favorable decision and the judicial relief they seek (the termination of LEAA funding to those state and local agencies). Plaintiffs cannot

> make this showing because the state and local agencies might well choose not to receive LEAA funding rather than to discontinue their challenged practices.

Brief for Appellees at 34-35 (citations omitted). This case, however, comes to us on a motion to dismiss, granted by the district court before any discovery or evidentiary proceedings had begun. Thus, although the Government might be correct in asserting that plaintiffs cannot establish "the redressability aspect of standing," they have not yet had an opportunity to do so.[9] In *Committee for Full Employment* v. *Blumenthal*, 606 F.2d 1062 (D.C. Cir. 1979) (Bazelon, J.), this court faced a nearly identical situation. The plaintiffs in that case had sued the Secretary of the Treasury for failing to discontinue the funding of state and local governments that, according to the plaintiffs, had unlawfully discriminated against them. This court reversed the district court's decision to dismiss the action for lack of standing:

> At the very least, appellants were entitled to conduct discovery to buttress their allegation that there is a substantial likelihood that the relief they request will eliminate their injury. Their pleadings are not so deficient on their face, nor so implausible, that the district court was entitled to conclude the standing issue on a motion to dismiss.

Id. at 1067. Likewise, at this stage of the proceedings in the present case, plaintiffs' pleadings are sufficient to resist a motion to dismiss based on standing. In my view, contrary to the majority's suggestion, see Maj.

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[9] Although standing is usually decided on the pleadings, the question sometimes depends on the development of evidence concerning the factual requisites for establishing standing. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 n.31 (1979); NAACP, Boston Chapter v. Harris, 607 F.2d 514, 526 (1st Cir. 1979).

Op. at 7 n.16, the district court should defer its final determination of the standing question until evidence is presented on the redressability issue.[10]

II. Official Immunity

The majority holds that the four individual defendants in this case are entitled only to qualified, and not to absolute, immunity in resisting plaintiffs' claims for monetary damages. I disagree.

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Supreme Court ruled that a federal official's immunity from monetary liability for constitutional violations[11] is generally a qualified one, depending on proof that the offical acted reasonably and in good faith. Nonetheless, the Court made clear that this general rule does not apply "where it is demonstrated that absolute immunity is

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[10] Although plaintiffs claim compensatory and punitive damages in addition to seeking declaratory and injunctive relief, this does not negate the requirement of standing. To be sure, a person suffering actual money damages has an adequate "injury" for standing purposes. Nonetheless, to establish his standing, the complainant must also show that his damages were caused by the governmental conduct that he claims was unlawful. The requirement of causation, which parallels "the redressability aspect of standing," demands that the complainant's injury "fairly can be traced to the challenged action of the defendant." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1975). *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978). A claim of monetary damages cannot establish standing unless this causation/redressability component of the standing requirement is met.

[11] The Court in *Economou* limited its holding to constitutional claims, 438 U.S. at 495 n.22, although it also addressed claims of an "officer ignor[ing] an express statutory ... limitation on his authority," *id.* at 489. Because I find that even under *Economou* the defendant officials are protected by an absolute immunity, I need not reach the issue of whether certain of plaintiffs' claims are outside the scope of the *Economou* ruling.

essential for the conduct of public business." *Id.* at 507. In particular, the Court observed:

> We ... believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought....
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete....
>
> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment.

Id. at 515-16.

Although the Court in *Economou* emphasized the need to protect decisionmaking *in favor* of initiating or moving forward with proceedings, decisions *not* to initiate or move forward clearly must be given the same protection, for to immunize decisions in one direction but not the other would eviscerate the very discretion that the Court sought to protect. As the Government points out, to create a one-sided immunity protecting only decisions to move forward would be to create "an improper bias in decision-making, i.e., prosecutors would be encouraged to act, as opposed to taking no action. Prosecutors must be free to make a decision without being influenced in either direction by fear of liability." Supplemental Brief for Appellees at 7.

To determine whether absolute "prosecutorial" immunity applies, we must focus on the particular conduct

and circumstances that gave rise to the claim of liability. *See Tigue* v. *Swaim*, 585 F.2d 909, 914 (8th Cir. 1978). *See also Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1212 (3d Cir. 1979). Here, plaintiffs claim damages from the failure of the four individual defendants to terminate federal funding to state and local entities that were allegedly discriminating against plaintiffs. The challenged conduct relates directly to the defendant officials' decisionmaking concerning whether to move forward with a proceeding to terminate funding, or, for example, to seek voluntary compliance with the statutory nondiscrimination requirements (perhaps under the threat of termination). In my view, this type of decisionmaking is exactly what the Supreme Court had in mind when it spoke of functions "analogous to those of a prosecutor," *Butz* v. *Economou*, 438 U.S. at 515. *See also Simons* v. *Bellinger*, No. 77-2012 (D.C. Cir. Jan. 4, 1980) (finding members of bar association committee on unauthorized practice of law entitled to absolute immunity).

Contrary to the majority's suggestion, *see* Maj. Op. at 6, the defendant officials, under the applicable statutory scheme, did not lack the requisite discretion for "prosecutorial" immunity.[12] The key statutory provisions are sections 3766(c)(2) and 3757 of title 42 of the United States Code, 42 U.S.C. § §3766 (c)(2), 3757

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[12] Although the basic statutory provision concerning the prosecution of federal crimes states that "each United States attorney, within his district, *shall* ... *prosecute for all* offenses against the United States," 28 U.S.C. § 547 (1976) (emphasis added), no one would seriously contend that United States Attorneys lack discretion in carrying out their prosecutorial functions. *See Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.).

(Supp. V 1975) (amended 1976),[13] as those sections read before Congress enacted amendments in 1976.[14] In con-

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[13] Section 3766(c)(2) provides:

> Whenever the Administration determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirements], it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 3757 of this title, and is authorized concurrently with such exercise—
>
> (A) to institute an appropriate civil action;
>
> (B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or
>
> (C) to take such other action as may be provided by law.

42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976). The "powers and functions provided in section 3757," in turn, are as follows:

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

Id. § 3757 (amended 1976).

[14] Plaintiffs' claims for damages are based on conduct of the defendant officials before the statute was amended in 1976, and it is thus the pre-amendment version of the statute that is controlling on the damages question. Even as amended in 1976, however, there is still room for some discretion concerning de-

cluding that section 3766(c)(2) leaves "virtually no discretion" with the defendant officials, *see* Maj. Op. at 6, the majority relies on an unduly narrow reading of the statutory language.[15] For section 3766(c)(2) to apply, the appropriate LEAA officials must first "determine" that a governmental unit has violated the nondiscrimination provisions. After such a determination is made, the officials then seek voluntary compliance by the governmental unit with the assistance of the chief executive of the state involved. The LEAA officials must decide when a "reasonable time" has passed after such assistance has been unsuccessfully requested, at which point the officials are directed to exercise the powers and functions provided in section 3757 and are also authorized to take any other appropriate and lawful action to secure compliance. Section 3757 calls for a termination of funding only if there has been a "substantial" failure to comply with the nondiscrimination provisions. Moreover, the officials have express discretion in determining the extent of any cutoff that might be ordered. Indeed, it was congressional dissatisfaction with this discretionary scheme that led to the adoption in 1976 of

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terminations of noncompliance. *See* H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 26-27 (1976).

[15] Speaking on the floor of the House of Representatives, Representative Jordan described the intended operation of these nondiscrimination provisions:

> [W]e now have a provision in the bill which will strengthen civil rights enforcement, a provision in the bill which will not say we cut off the funds if they simply discriminate, but that this Law Enforcement Assistance Administration must adhere to the provisions of title 6 of the Civil Rights Act of 1964, that before any funds are denied any agency or entity in terms of the charge they have discriminated must be entitled to a hearing.
>
> The Governor of the State is the first one who must make the effort to resolve any conflict which will exist. Negotiations, hearings, due process, all is provided for.

119 CONG. REC. 39,097 (1973).

amendments "to provide a mandatory procedure which the Administration must follow in the event a recipient of LEAA funds is determined to have used those funds for a discriminatory purpose," H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 25 (1976).[16]

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[16] In adding the nondiscrimination provisions to the LEAA funding program, Congress obviously intended to continue the funding of criminal justice programs, but without unlawful discrimination. Although a cutoff of funds to one recipient may eventually bring that recipient and others into compliance with the nondiscrimination requirements, *negotiated* compliance, without the need for a cutoff, more directly and immediately achieves the overall congressional goal of "funding without discrimination." Such an overall goal necesarily creates a tension between the desire to continue funding criminal justice programs and the desire to eliminate discrimination, and this tension in turn requires that officials have discretion in implementing these twin congressional policies.

In amending the statute in 1976, Congress recognized that the LEAA had been attempting to secure compliance with the nondiscrimination provisions, but Congress indicated dissatisfaction with the manner in which the LEAA officials had exercised their discretion and therefore decided to limit that discretion in the future.

> The responsibility of LEAA and its failure to enforce aggressively the pertinent civil rights provisions does not emerge ... as unmistakably clear. There is evidence that LEAA did try to influence the course of the hiring and personnel practices of the offending police departments, but there is also evidence that the influence was not remarkably successful....
>
> It is my view that the argument surrounding LEAA's performance in the area of civil rights is caused by a fundamental difference in the understanding of the purpose and intent of the remedies contained in the civil rights provisions of the act. On the one hand, there are those who believe that the termination provisions of the act, that is—the cutoff of Federal funds—should be used freely when evidence of discrimination is found. On the other hand, there are those who view the LEAA program as one primarily for assistance to State and local criminal justice agencies for use in the long range fight against crime. This latter school of thought holds that fund termination is the most drastic remedy available and should be used sparingly. Because of these differences certain ambiguities have

The Supreme Court's language in *Ferri* v. *Ackerman*, 100 S.Ct. 402 (1979), is equally appropriate in the present context:

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Id. at 408-09 (footnote omitted). By denying absolute immunity to administrators charged with making choices akin to those of a prosecutor, the majority decision is bound to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.), *cert.*

---

arisen in the determination of how the civil rights provisions of the act should be administered. Therefore, in my view, a clarification of the intent of the Congress is needed to establish just when and how the various procedures contained in the act should be used.

... [Under the 1976 amendements,] the duties of LEAA will be clear, and the threat of fund cutoff will be equally as clear to the fund recipients. Hopefully, this amendment will eliminate charges and countercharges of what should have been done in this important area. Thereby the objectives of the act both as to criminal justice funding and nondiscrimination will be accomplished.

122 Cong. Rec. 28,496 (1976) (remarks of Rep. McClory).

Whether the 1976 amendments would affect the ability of LEAA officials to claim absolute immunity for conduct arising after their effective date is a question we need not resolve. *See* note 14 *supra*.

denied, 339 U.S. 949 (1950), *quoted in Ferri* v. *Ackerman*, 100 S.Ct. at 409 n.20.[17] I cannot join such an action.

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[17] As the potential liability of federal officials for constitutional wrongs expands, *see, e.g.*, Davis v. Passman, 442 U.S. 228 (1979), it becomes all the more important to safeguard vigorously the discretion of those federal officials whose functions must be especially protected from "the constant dread of retaliation," Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.), *cert. denied*, 339 U.S. 949 (1950), *quoted in* Ferri v. Ackerman, 100 S.Ct. 402, 409 n.20 (1979). *Cf.* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting) ("it is not a tort for government to govern"). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2600-0, at 216 (Spec. Supp. 1980) (extent of liability for constitutional torts may be affected by extent of official immunity). For an argument that absolute immunity for all high ranking executive officials should be reinstated, see Comment, *Qualified Abrogation of Federal Executive Immunity: A Risky Experiment in Judicial Legislation*, 19 S. TEX. L.J. 685 (1978).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1444
Filed Dec. 8, 1976

NATIONAL BLACK POLICE ASSOCIATION, ET AL.,
PLAINTIFFS

v.

RICHARD W. VELDE, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' motion to dismiss or for summary judgment, defendants' alternative motion to dismiss as moot, plaintiffs' oppositions thereto, the memoranda in support thereof and in opposition thereto, the entire record herein, and the Court having been fully apprised in the premises, it appears to the Court that,

A. Insofar as plaintiffs assert claims for declaratory and injunctive relief against the defendants in their official capacities, this action has been rendered moot by virtue of the enactment of the Crime Control Act of 1976, P.L. 94-503, on October 15, 1976. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1968); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969); *Cort* v. *Ash*, 422 U.S. 66, 74-77 (1975).

B. As to plaintiffs' claims against the defendants in their individual capacities, the challenged actions of the defendants clearly fall within the outer perimeter of the line of their official duties, *Barr* v. *Mateo*, 360 U.S. 564 (1959), and discerning inquiry leads to the conclusion that "the contributions of immunity to effective government" in the present context significantly "outweighs the perhaps recurring harm to individual citizens," *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973); *see Henderson*

v. *Bluemink*, 511 F.2d 399, 401 (D.C. Cir. 1974). Consequently, plaintiffs' claims for monetary damages against the defendants in their individual capacities are barred by the doctrine of official immunity.

In accordance with the foregoing, it is, by the Court this 8th day of December, 1976,

ORDERED that insofar as plaintiffs sue the defendants in their official capacities, this action is dismissed as moot. And it is further,

ORDERED that insofar as plaintiffs sue the defendants in their individual capacities, this action is dismissed.

/s/ Howard F. Corcoran
Judge

Dec. 8, 1976

No. 83-1254

Office - Supreme Court, U.
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD W. VELDE, et al.,

Petitioners,

—v.—

NATIONAL BLACK POLICE ASSOCIATION, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Respondents -- the National Black Police Association and twelve discriminated-against individuals -- alleged in their complaint that petitioners willfully and maliciously refused to enforce any of their constitutional and statutory civil rights enforcement obligations, including petitioners' constitutional and statutory obligation to terminate federal grants to state and local police departments which petitioners knew were practicing discrimination. The questions sought to be presented to this Court are:

1. Did respondents state a claim for relief under the Fifth Amendment by alleging that petitioners "willingfully and maliciously" provided funding to grantees known to be discriminatory?

2. Are petitioners, who are alleged to have "willfully and maliciously" provided funding to grantees known to be dis-

criminatory, entitled to qualified immunity from any liability for damages on the ground that their alleged conduct did not violate any clearly established constitutional rights?

3. Are petitioners, who adopted and followed a policy of never terminating funding to grantees known to be discriminatory, entitled to absolute immunity on the ground that they performed discretionary functions analogous to those of a prosecutor?

4. May respondents seek damages for petitioners' across-the-board refusal to carry out their mandatory enforcement obligations under § 518(c)(2) of the Crime Control Act, as amended in 1973?

5. Do respondents, who alleged injury and causation/redressability, have Art. III standing to mantain this lawsuit?

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STATEMENT

Most of petitioners' mischaracterizations of respondents' claims, and of the prior proceedings in this case, were addressed when this case was previously before the Court. See Br. for Resps. at 1-10, Velde v. National Black Police Association, 458 U.S. 591 (1982) (No. 80-1074). A few additional comments nonetheless are in order here.

First, respondents nowhere alleged in their complaint "that petitioners took many steps to enforce [petitioners'] civil rights obligations." Cert. Pet. at 7. To the contrary, respondents repeatedly alleged in their complaint that petitioners willfully and maliciously refused to enforce any of their constitutional and statutory civil rights enforcement obligations including their constitutional and statutory obligation to terminate federal grants to state and

local police departments which petitioners knew were practicing discrimination. J.A. 11-45.[1/]

Second, respondents' allegations were duplicated by the findings of subsequent investigations conducted by the Executive Branch and by Congress.[2/] And, despite the trial court's denial to respondents of all discovery in this case, J.A. 1-3, 341-45, respondents' allegations nevertheless were

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1 "J.A." refers to the Joint Appendix filed when this case was previously before this Court, see Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

2. The congressional findings documenting petitioners' blatant disregard of their civil rights enforcement obligations are summarized in the Br. for Resps. at 1-10, 1a-24a, Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

Findings issued by the Civil Rights Commission two months after this lawsuit was filed also closely paralleled the allegations of the complaint. U. S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT -- 1974 (Vol. VI, To Extend Federal Financial Assistance) 271-393, 773-77 (1975). The Commission's report was filed with the district court as an exhibit to respondents' motion for preliminary injunction, and relevant portions of the report were reprinted in the Appendix filed in the court of appeals, C.A. App. 481-623.

well supported by documents in the record which had been obtained from petitioners under the Freedom of Information Act prior to the filing of this lawsuit.[3/]

Finally, although the proceedings in this case admittedly have been lengthy, the delay has harmed not petitioners but respondents. Moreover, respondents submit that protraction has been caused by petitioners' repeated raising of new and alternative, insubstantial arguments which never were ruled on by the trial court.

REASONS WHY THE WRIT SHOULD BE DENIED

Several of the questions presented by petitioners here were presented to this Court two Terms ago in this case, Velde v. National

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3. Many of these FOIA documents were filed by respondents in in support of their motion for a preliminary injunction and writ of mandamus, J.A. 46-233, and in support of respondents' opposition to petitioners' motion to dismiss or for summary judgment, J.A. 340-494.

Black Police Association, 458 U.S. 591 (1982) (No. 80-1074) (Powell and Stevens, JJ., not participating), see Cert. Pet. App. 34a. The questions did not warrant rulings from this Court, and the case instead was remanded on the issue of qualified immunity "for further consideration in light of Harlow v. Fitzgerald, 457 U.S. 800 (1982)." Id.

Several of the other questions presented by petitioners, now as before, were never ruled on by the trial court and were not decided by the court of appeals in either its initial decision or in its remand decision.

Especially in light of this procedural posture, there are no substantial questions which merit plenary review.

1. Petitioners seek review of a question never addressed by any of the lower courts in this case: whether the complaint states a claim under the Fifth Amendment.

Petitioners argue that respondents never alleged "that petitioners acted with discriminatory intent" and that the complaint accordingly "does not state a claim under the Constitution." Cert. Pet. at 12.

a. This question was never addressed by the trial court in this case, nor was it addressed by the court of appeals in either of its two decisions below. As summarized by the court of appeals in its remand decision:

> The district court has not yet ruled whether [respondents'] complaint states a claim upon which relief can be granted. We did not address this issue in our first opinion, and the issue has not been briefed for us. We therefore do not view the issue as properly presented for our decision in the present posture of this case.

Cert. Pet. App. 7a note 27. For the same reasons, the issue is not now properly presented to this Court.[4/]

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4. Petitioners' insistence upon seeking review of a question never decided below belies their purported [cont'd. on next pg]

b. The question also is improperly presented as it is premised upon petitioners' extensive mischaracterization of the explicit language of the complaint, which alleges that petitioners' unconstitutional actions were "willful and malicious." J.A. 44. The complaint not only contains an explicit elaboration of the manner in which petitioners were alleged to have been "acting unconstitutionally and in excess of their authority," see J.A. 41-43, but also includes repeated references to petitioners' knowing refusals to alter their discriminatory policies and practices, see, e.g., J.A. 21-41. Respondents, through their unavailing contacts with petitioners, had every reason to believe that petitioners' unconstitutional

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concern about the length of the proceedings in this case, in which petitioners have succeeded in blocking all proceedings in the trial court for more than eight years. "[I]n any event, [the] question [now raised] should be decided in the first instance by the" courts below. Escambia County v. McMillian, No. 82-1295, slip op. at 4 (U.S. March 27, 1984) (per curiam).

conduct was "willful and malicious," and so they alleged. J.A. 44. No greater specificity in pleading is required. Cf. Gomez v. Toledo, 446 U.S. 635 (1980).

2. Petitioners ask this Court to review the question which the court of appeals decided on remand in light of Harlow v. Fitzgerald, 457 U.S. 800 (1982): whether petitioners had "'clearly established' . . . constitutional duties to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully on the basis of race and sex." Cert. Pet. App. 2a. Based upon a long line of this Court's decisions dating from 1958, the court of appeals recognized that "it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating," Cert. Pet. App. 20a, and

held that petitioners accordingly were not entitled to qualified immunity on summary judgment under Harlow. Petitioners, who do not directly dispute that the governing constitutional principles had been clearly established, have presented no substantial issue here.

a. In Harlow, this Court held that "government officials performing discretionary functions" are not entitled to qualified immunity where they are alleged to violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. There can be no question here that clearly established constitutional principles bar government officials not only from engaging in direct discrimination but also from providing government "support" to discrimination "through any arrangement, management, funds or property." Cooper v. Aaron, 358

U.S. 1, 19 (1958). As Chief Justice Burger unequivocally reiterated for the unanimous Court in Norwood v. Harrison, 413 U.S. 455, 467 (1973), a government agency's "constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." See also Gilmore v. Montgomery, 417 U.S. 556 (1974); Coit v. Green, 404 U.S. 997 (1971), sum. aff'g sub nom Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971). Petitioners, who not only served as law enforcement officials but also were lawyers, do not seriously dispute that the foregoing decisions clearly established petitioners' constitutional obligations. Cert. Pet. at 17-19. The court of appeals' proper application of these decisions through the objective test in Harlow is unassailable.[5/]

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5. Although petitioners complain that the court of appeals' decision does not provide adequate guidance to federal officials who seek to avoid liability, [cont'd. on next pg]

b. Qualified immunity is also unavailable to petitioners as they did not and cannot meet the threshold Harlow requirement of exercising "discretionary functions." 457 U.S. at 818. As the court of appeals recognized in its first decision below, in view of petitioners' mandatory statutory duties under § 518(c)(2) of the Crime Control Act, 42 U.S.C. § 3766(c)(2) (Supp. V 1974), see infra at 11-13, petitioners had "virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding to discriminatory recipients." Cert. Pet. App. 39a. In fact, the "mandatory language" of the statute, when

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Cert. Pet. at 17-19, we fail to understand how federal enforcement officials can mistake the meaning of the court of appeals' decision or of the decisions of this Court in the context of this case. Petitioners, after all, were alleged to have willfully and maliciously provided funding to known discriminators, and petitioners' own discriminatory actions were well documented by findings made by Congress and by the U.S. Commission on Civil Rights, see supra at 2 note 2, as well as through FOIA materials in the record of this case, see supra at 3 note 3.

read in conjunction with petitioners' "constitutional . . . duty not to allow federal funds to be used in a discriminatory manner by recipients, takes [petitioners'] civil rights enforcement duties outside the realm of discretion." Id. at 40a note 15; see also id. at 13a-20a. This lack of discretion also takes petitioners outside of the realm of qualified immunity under Harlow.

3. Ignoring their nondiscretionary statutory mandate, petitioners urge this Court to review yet again whether all of the petitioners should have been accorded absolute immunity based on this Court's allowance of prosecutorial immunity in Butz v. Economou, 438 U.S. 478, 515 (1978), to those specific agency officials who enjoy "broad discretion in deciding whether a [civil penalty] proceeding should be brought and what sanctions should be sought." Two Terms ago in this case, this Court declined to

adopt petitioners' identical argument and thereby declined to disturb the court of appeals' rejection of that argument. Cert. Pet. App. 34a. No substantial question is presented here.

a. The nondiscretionary enforcement obligations imposed upon petitioners by their governing statute, § 518(c)(2) of the Crime Control Act, precluded petitioners from claiming prosecutorial immunity. In enacting § 518(c)(2), Congress used language quite different from that in other statutes such as Title VI of the Civil Rights Act of 1964, and instead mandated the use of fund termination proceedings against grantees not in compliance with the statute's nondiscrimination requirements.[6/] By specifying that such pro-

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6. As the court of appeals explained: "The broad discretion over enforcement methods provided by Title VI is in sharp contrast to the mandatory language of the Crime Control Act." Cert. Pet. App. 13a.

The mandatory language of the Crime Control Act and the circumstances which compelled Congress to impose this uniquely stringent mandate are set forth at considerable length in the court of appeals' remand [cont'd. on next pg]

ceedings must be brought against grantees found to be discriminatory, Congress expressly denied petitioners any "broad discretion in deciding whether a proceeding should be brought." 438 U.S. at 515. Petitioners similarly had no discretion to decide "what [civil penalty] sanctions should be sought," id., since § 509 of their statute provided only for the termination of the "federal payments" which the noncomplying grantees were not eligible for in the first place. As the court of appeals succinctly concluded in direct response to petitioners' argument: "The purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency officials lack discretion." Cert. Pet. App. 39a; see also id. at 13a-20a.

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decision, Cert. Pet. App. 13a-20a, and in its initial decision, id. at 38a-40a. See also Br. for Resps. at 1-10, 16-29, 1a-24a, Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

b. The record here also bars petitioners' claim of prosecutorial immunity since the record establishes both that petitioners denied themselves all discretion and that they in fact never exercised any prosecutorial functions. First, and directly contrary to their statutory mandate requiring administrative action prior to pursuit of judicial relief, petitioners strictly adhered to an administrative regulation interpreted by petitioner Richard Velde to "require LEAA to pursue court action and not administrative action to resolve matters of employment discrimination." J.A. 90. Second, in their pre-Butz affidavits filed in the trial court, none of the petitioners anywhere claimed to have any prosecutorial functions much less either the authority or the responsibility for refusing to initiate administrative fund termintion proceedings. J.A. 236-64. Instead, petitioners uniformly described themselves only as administrators. Id.

Under Butz they accordingly are entitled to no more than qualified immunity.

4. Petitioners next ask this Court to review another question now raised for the first time in this litigation: "whether respondents may pursue a personal damages remedy against petitioners on the basis of the Crime Control Act alone." Cert. Pet. at 22-23.

a. Since petitioners never moved to dismiss respondents' complaint on this ground, J.A. 234-35, and since this question accordingly was never addressed by the trial court or by the court of appeals in either of its decisions, petitioners in effect seek an advisory opinion from this Court on a matter which has never been properly placed in issue. If petitioners truly desire a ruling on respondents' statutory cause of action, petitioners on remand may file an appropriate motion to dismiss with the trial court. The

issue simply is not properly presented here in the posture of this case. See supra at 5-6 & note 4.

b. Apart from their request for review of a question never before raised in this case, petitioners provide no legal support for their view that respondents lack a cause of action under the Crime Control Act. To the contrary, respondents fully satisfy each of the four criteria in Cort v. Ash, 422 U.S. 66, 78 (1975). Additionally, since Congress subsequently recognized the pendency of this lawsuit, approved of such actions, and preserved the implied right of action[7] when it amended § 518(c) of the Crime Control Act in 1976, respondents' cause of action is confirmed by the "contemporary legal context" in which Congress legislated. Cannon v. University of Chicago,

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7. See H.R. Rep. No. 155, 94th Cong., 2d Sess. 11, 27 (1976); see also LEAA Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 491-516 (1976).

441 U.S. 677, 698-99 (1979); see generally Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-88 (1982).

5. Petitioners lastly seek review of the holding below that respondents have Art. III standing to maintain this action. Contrary to petitioners' assertion, Cert. Pet. at 9 note 8, there was no disagrement among the appellate judges below that the allegations in the complaint were sufficient to establish respondents' standing, Cert. Pet. App. 2a note 3, 40a note 16, 42a-48a. Additionally, although respondents' standing was previously at issue before this Court -- and comprised the bulk of oral argument[8/] -- the court of appeals' initial decision upholding respondents' standing was not disturbed by this Court. Cert. Pet. App. 34a. Peti-

8. See Oral Arg. Trans. 4-8, 18, 26-30, 34-35, 37, 41, 43-44.

tioners advance no persuasive justifications for revisiting the question now.

a. As consistently alleged in this case, respondents were injured by petitioners' refusals to carry out their constitutional and statutory civil rights obligations and by petitioners' consequent funding of grantees which were also discriminating against respondents. See J.A. 18-41. As in Norwood v. Harrison, 413 U.S. 455 (1973), the alleged violations by petitioners caused the injuries which respondents assert; and, similarly, the relief sought by respondents (injunctive relief and damages) would remedy and compensate for the injuries caused by petitioners' transgressions. Respondents here -- in a position no different from that of the plaintiffs in Norwood and in Gilmore v. Montgomery, 417 U.S. 556 (1974) -- more than adequately alleged the injury and causation/redressability necessary to establish

their standing. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978).

b. Even under petitioners' mistaken view of this case (as one in which respondents' only injury was caused not by petitioners' own Norwood violations but instead solely by the discrimination practiced by petitioners' grantees, Cert. Pet. at 23-25), respondents have also met the injury and causation/redressability requirements of Art. III. As Judge Tamm stated in his separate opinion when the court of appeals first considered this case, Cert. Pet. App. 42a-48a, respondents' complaint was adequate to survive petitioners' motion to dismiss since respondents had to be allowed discovery to show that the actual or even threatened termination of funding to petitioners' discriminatory grantees would effect nondiscriminatory behavior by the grantees. Even

without discovery in this case, not only is the power of fund termination well documented, see Br. for Resps. at 40-42, Velde v. National Black Police Association, 458 U.S. 591 (1982) (No. 80-1074), but the actual existence here of injury and causation/redressability is in fact established in the record in this case with regard to petitioner Joel Michelle Schumacher.[9/] The standing of

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9. Respondent Schumacher, who had been denied employment by the New Orleans Police Department because she was a female, alleged in the complaint that she had "been discriminated against by the [petitioners] through their provision of and refusal to terminate their LEAA funding to the New Orleans Police Department, despite the [petitioners'] knowledge that the Department has discriminatorily denied employment to [respondent] Schumacher." J.A. 34.

At the time the complaint was filed -- in September, 1975 -- petitioners had never invoked or even threatened to invoke the mandatory fund termination proceedings against discriminatory grantees. J.A. 21. Subsequent to the filing of this lawsuit, however, petitioners began to change their posture of nonenforcement. One such instance, revealed in the record in this case, establishes respondent Schumacher's standing under petitioners' own narrow theory.

Subsequent to the filing of this lawsuit, and substantially after petitioners had found the New Orleans Police Department to be illegally engaged in sex discrimination, petitioner Herbert Rice advised [cont'd. on next pg]

one respondent thus having been affirmatively established beyond peradventure, respondents' complaint may not now be dismissed. Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981).

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the Superintendent of Police that without the immediate elimination of the discrimination petitioners "will be forced to initiate administrative proceedings to terminate funding to your Department." Within weeks, the Superintendent of Police responded to petitioner Rice that the discrimination was being eliminated solely because of the proposed "cancellation of all LEAA fundings to this Department," and in fact "under duress, namely, the threatened cancellation of LEAA fundings to this Department." See Attachments N.O.-9 and N.O.-10 appended to the Statement of Reasons and Appendix filed in the district court in support of Defendants' Motion to Dismiss or for Summary Judgment.

CONCLUSION

No substantial issues warranting further briefing or oral argument have been raised by petitioners. The writ of certiorari should be denied.

Dated: April 6, 1984

Respectfully submitted,

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No. 83-1254

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondents have failed to answer — for the most part, they have not even addressed — the reasons we advanced for this Court to review the court of appeals' decision. Respondents nowhere dispute that the court of appeals' approach, if it prevails, is likely to have a highly disruptive effect on the many important federal programs that involve the distribution of funds to agencies of state and local governments (see Pet. 11-12). In the Petition, we explained that the constitutional "duty" to terminate funding discerned by the court of appeals does not exist and cannot, by any stretch of the term, be viewed as "clearly established" within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (see Pet. 12-18); in response, respondents offer (Br. in Opp. 8-9) only a desultory argument consisting of two out-of-context quotations from decisions that, as we showed in the Petition, cannot possibly be read to establish such a clear duty. In the Petition, we said that we knew of no case

finding an implied statutory cause of action for damages against a federal official in his personal capacity; respondents do not identify any such case or even assert that one exists.[1] We urged (Pet. 19-20) that petitioners are entitled to absolute immunity because they were "agency officials performing * * * functions analogous to those of a prosecutor" (*Butz* v. *Economou*, 438 U.S. 478, 515 (1978)); respondents do not dispute this description of petitioners' functions. And respondents do not contest our submission that this case is on all fours with *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); indeed, they do not cite or discuss *Eastern Kentucky* at all.[2]

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[1]Respondents' apparent assertion that Congress "approved of" personal damages actions against LEAA officials (Br. in Opp. 16 & n.7) is quite incorrect. The House committee report cited by respondents refers only to "civil actions against the United States or [the] recipient government to remedy violations of the statutes" — not to damages actions against government officials in their personal capacity. H.R. Rep. 94-1155, 94th Cong., 2d Sess. 27 (1976).

[2]Although respondents attempt to create the impression that we did not raise below many of the questions presented in the Petition (see, *e.g.*, Br. in Opp. 4-5), they in fact assert only that we did not raise the question whether there is an implied cause of action for damages against individual government officials under the Crime Control Act (see Br. in Opp. 15). But the complaint itself does not explicitly rely on the Crime Control Act as a basis for seeking damages (see J.A. 44); respondents have revised their theory of this action as the litigation progressed. In view of the lack of clarity in the complaint, we believe the motion to dismiss fairly comprises the contention that there is no implied statutory cause of action (see J.A. 234-235). In any event, we explained in the Petition why the Court should decide this issue now (Pet. 22-23).

Notably, respondents, unlike the court of appeals, do not suggest that petitioners failed to raise below the question whether the complaint states a violation of the Constitution. As we said in the Petition, the court of appeals' statement is indisputably erroneous (see Pet. 12 n.10). Respondents do assert (Br. in Opp. 4-5) that the court of appeals did not decide this question; but the issue is clearly subsumed under the court of appeals' decision that respondents' allegations state a violation of clearly established constitutional rights.

We comment briefly on the two points that respondents do appear to emphasize, because these points further demonstrate that respondents' approach, and that of the court of appeals, is fundamentally inconsistent with *Harlow* and misunderstands the role of *Bivens* actions.

1. Respondents contend (*e.g.*, Br. in Opp. 1-2, 6, 7, 10 n.5) that the court of appeals was correct in ordering further proceedings because they alleged that petitioners' actions were "willful and malicious." This allegation occurs in a boilerplate passage in the ad damnum clause of the complaint. It is not connected to any specific action attributed to petitioners, and it is unsubstantiated by any specific assertions of fact. The central holding of *Harlow* is precisely that such "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 817-818).[3]

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[3]Respondents contend (Br. in Opp. 10) that petitioners are not entitled to qualified immunity because the Crime Control Act deprived them of all discretion to decide whether to terminate funding and they therefore, according to respondents, did not exercise "discretionary functions." This argument echoes that made by the appellees in *Davis* v. *Scherer*, No. 83-490 (argued Apr. 16, 1984), and we responded to it in our amicus curiae brief in that case. (A copy of this brief has been sent to respondents.) We explained in the Petition (at 20-22) why respondents' contention that the Crime Control Act denies petitioners all discretion is, in any event, implausible.

We note that respondents do not suggest that this case be remanded to the court of appeals for reconsideration in light of *Davis*, and in our view such an action would be pointless. The court of appeals has already determined that petitioners are not entitled to qualified immunity because they violated clearly established constitutional rights. Whatever the outcome of *Davis*, therefore, the court of appeals will order discovery and possibly a trial in the district court unless this Court overturns its decision.

2. Respondents also assert (*e.g.*, Br. in Opp. 2, 16) that members of Congress and the Civil Rights Commission criticized the civil rights enforcement policies of the LEAA.[4] But these are precisely the forums in which these policies should be examined; they should not be the subject of a *Bivens* action. The central error of the court of appeals' decisions in this case has been to allow respondents to pursue, for nine years, this $20 million personal damages action against former high government officials on the basis of a complaint that alleges, at bottom, only dissatisfaction with complex discretionary policy judgments made by officials in supervising the distribution of LEAA funds. Allowing *Bivens* actions to proceed under these circumstances risks distorting the decisions of the many government officials who supervise programs that involve the distribution of federal funds. We submit that the Court never intended *Bivens* actions to be used in this way, or to have this effect.

For these reasons and the reasons stated in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1984

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[4]Respondents ignore the fact that these comments by Members of Congress, and the context in which they were made, contradict respondents' principal assertion about congressional intent. Respondents assert that, even before 1976, petitioners had no discretion to decide whether to terminate funding (see Br. in Opp. 11-13); but the debates over the 1976 amendments to the Crime Control Act, on which respondents rely, reveal that Congress believed LEAA officials had *too much* discretion during the time. See Pet. 22 n.16.

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